No. Supreme Court, U.S.

In The 991293 JAN 27 2000

Supreme Court of The United States OFFICE OF THE CLERK

October Term, 1999

KAREN A. BRISCOE,

Petitioner,

- against -

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a black female employee, who performed a position, with a 7 to 8 pay level higher than hers, in an exemplary manner for 4 to 5 years, without promotion, where less qualified white employees are regularly promoted, establish a genuine issue of a material fact against her employer of racial, sexual and national origin discrimination and a violation of the Equal Pay For Equal Work Act, 29 U.S.C.A §206, that should be tried before a jury of her peers?

2. Does a black female employee, who was denied promotions, that were given to white employees, where she and the recipients had minor flaws in satisfying all of the criteria of the positions, establish genuine issues of material facts of racial, sexual and national origin discrimination that should be tried before a jury of her peers?

3. Is the failure of an employer to make all job postings available to black employees, of which the petitioner is a member, a violation of Title VII, and establishes genuine issues of material facts of racial and national origin discrimination that should be tried before a jury of her peers?

4. Does an employer's employees, retaliation against a black female employee, by participating in a protected activity, known to the employer, such as disparate treatments in employment that disadvantage her, where there is a causal connection between the activity and the filing of her civil rights case, give rise to a genuine issues of material facts of retaliation to be tried before a jury?

TABLE OF CONTENTS

Page

Questions Presented For Review i

Table of Contents ii

Table of Authorities iv

Statutes Involved vii

Opinion Below 1

Jurisdiction 2

Statement of The Case 2

REASONS FOR GRANTING THE WRIT OF CERTIORARI 5

1. The Petitioner Managed Her Department From 4 To 5 Years, with A Pay Level of 17, Where The Official Minimum Pay Levels For The Position Were 52 To 54, All In Violation Of The Equal Pay For Equal Work Act, 29 U.S.C.A. § 2066 5

II. The Respondent Required The Petitioner To Be Flawless Or Perfect To Satisfy The Prerequisite For The Job-Posting Positions Available 10

III. The Lower Court Erred When It Dismissed Petitioner's Complaint Without The Failure Of The Respondent To Post Job Openings, Where There Are Genuine Issues Of Material Facts, In Dispute, As To Whether All Job Openings Were Made Available To Minority Employees, Of Whom The Petitioner Is A Member 14

IV. The Lower Court Abused Its Discretion When It Dismissed Petitioner's Complaint, With Respect To Her Charges Of Retaliation Against Her, By IBM, When There Are Genuine Issues of Material Facts In Dispute As To Whether The Respondent's Retaliatory Activities Against Her Were Because She Filed This Civil Rights Action 18

1. IBM Denied The Petitioner The Right To Work At Home, Because Of Her Limited Disability, As Was Done For Other Employees 19

2. The Petitioner's Manager Conspired With Other Co-workers To Undermine Her Supervisory Or Managerial Authority 20

3. IBM's Doctor-Employee Disregarded Petitioner's Medical Restrictions And Subjected Her To A Harmful Environment And Was Abusive To The Petitioner And Petitioner's Caretaker 20

CONCLUSION 22

TABLE OF AUTHORITIES

page

CASES

Anderson v. Liberty Lobby, Inc.
477 U.S. 242 9,17

Beth Anno Faragher v. City of Boca Raton
118 S. Ct. 2275, 864 F. Supp. 1552,
76 F. 3d 1155 7

Brown v. Gaston county Dyeing Mach. Co.
457 F. 2d 1377 (4th Cir.), cert. denied,
409 U.S. 982 15

Castro v. Beecher
459 F. 2d 725 11

Celotex v. Catrett
477 U.S. 317 9

Chance et al. v. The Board of Examiners
458 F. 2d 1167 11,17

Cohen v. Community College of Philadelphia
484 F. Supp. 411 19

County of Washington et al.v. Alberta Gunther et al.
452 U.S. 161 5

Dister v. Continental Group
859 F. 2d 1108 (2d Cir. (1998) 18

Forsberg v. Pacific Northwest Bell Telephone Co.
622 F. Supp. 1150 6

Gallo v. Prudential Residential Services
22 F. 3d 1224 9

Glenn, Johns and Nugent v. General Motors Corporation, Saginaw Steering Gear Divison
841 F. 2d 1567 5

Gaines v. Haughton
645 F. 2d 761 (9th Cir.) 21

Grant v. Morgan Guaranty Trust Company of New York
638 F. Supp. 1528 15

Griggs v. Duke Power Co.
401 U.S. 424 11

Grumbine v. United States, et al.
586 F. Supp. 1144 6

Heyman v. Commerce and Industry Co.
524 F. 2d 1317 (2d Cir. 1975) 12

Kirschner and Greif v. Office of The Comptroller of The City of New York
972 F. 2d 88 12

La Riviere v. Equal Employment Opportunity Commission
682 F. 2d 1275 (9th Cir.) 21

McDonnell Douglas Corporation v. Green
411 U.S. 802 . . . . . passim

McDonnell Douglas Corporation v. Percy Green
411 U.S. 678 . . . . . passim

Patrowich v. Chemical Bank
63 N.Y. 2d 541 6

Powell v. Syracuse University
580 F. 2d 1150 (2d) Cir.)
cert. denied 439 U.S. 984 (1978) 10,13

Quaratino v. Tiffany & Co.
71 F. 3d 58 4

Rossini v. Ogilvy & Mather, Inc.
597 F. Supp. 1120 15

Server v. Interpace Corp.
657 F. 2d 1115 (9th Cir.) 21

Shah v. New York State Department of Civil Service, Docket No. 98-7097
United Court of Appeals (1999) 19

Ste Marie v. Eastern Railroad Assoc. & Traffic Executive Assoc.
458 F. Supp 1163 15

Summers and Matwyshen v. County of Monroe
537 N.Y.S.2d 703 6

Texas Department of Community Affairs v. Burdine
450 U.S. 248 (1981) 5

Torres v. Pisano
116 F. 3d 625 (2d Cir.) cert. denied
118 S. Ct. 563 1997) 4,18

Walker v. New York Office of Mental Health, Rockland Psychiatric Center
1998 WL 639392 (2d Cir. N.Y.) 15

RULE AND STATUTES

28 U.S.C. §§ 1331, 1337, 1343 and 2201 2

42 U.S.C. §§ 2000e et seq. 2

42 U.S.C § 1981 2,4

28 U.S.C § 1291 2

29 U.S.C.A. § 206 5

29 U.S.C.A. § 206 (d)(1) 6

Rule 56(c) of the Federal Rules of Civil Procedure 2

Rules 401 and 402 Fed Rules of Evidence 3,9

42 U.S.C. § 2000e-3(a) 9,18

Title VII of the Civil Rights Act of 1964, as Amended 2,22

Appendix

Notice of Right to Sue 1a

Letter of Percy W. Briscoe, Esq. dated May 15, 1998 Indorsed on May 19, 1998 . . . . . 2a

Court of Appeals Order dated October 29, 1999 . . . . . 4a

Admission Records Provided by IBM 6a

Affidavit of Thomas K. Fitzgerald 10a

Report and Recommendation of
Hon. George A. Yanthis
dated December 14, 1998 . . . . . 12a

Order, Hon. Barrington D. Parker, Jr.
dated February 22, 1999 . . . . . 33a

Amended Verified Complaint 37a

Affidavit of Karen A. Briscoe 46a

Karen A. Briscoe Resume 48a

Affidavit of Reginald Staples 50a

Affidavit of Jeanette Briscoe 52a

Affidavit of John J. Okon 54a

Affidavit of Philip L. Knight 56a

Affidavit of Curtis McKoy 58a

Affidavit of Anna Monroe 60a

Affidavit of Lelia B. Jack 62a

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1999

KAREN A. BRISCOE,

Petitioner,

-against-

INTERNATIONAL BUSINESS MACHINE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Karen A. Briscoe, petitions for a writ of certiorari to review the Order and Judgment of the United States Court of Appeals for the Second Circuit, which affirmed the Order and Judgment of the United States District Court for the Southern District of New York for dismissing petitioner's Civil Rights Complaint for promotion, equal pay for equal work and retaliation for her filing a complaint, as a matter of law.

OPINION BELOW

The order and opinion of the U.S. Court of Appeals were entered on October 29, 1999 are unreported (4a). The order and judgment of the U.S. District Court for Southern District of New York were issued on February 22, 1999 and February 23, 1999 and are unreported (12a,33a).

JURISDICTION

The order and judgment sought to be reviewed were entered by the District Court on February 22, 1999 and February 23, 1999, respectively (12a,33a). Subject matter jurisdiction of the District Court in the underlying action was invoked under 28 U.S.C. §§ 1331, 1337, 1343 and 2201 which grants federal questions jurisdiction arising from petitioner's complaint under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq. and 42 U.S.C. §1981 (37a).

Subject matter jurisdiction of the Court of Appeals is invoked under 28 U.S.C. §1291. This Court's jurisdiction to review the Order and Judgment of the United States Court of Appeals for the Second Circuit against the petitioner is invoked pursuant to Sections 42 U.S.C. 1331, 1337, 1343 and 2201.

This petition was timely filed within 90 days of the decision of the Court of Appeals for the Second Circuit, which was entered on October 29, 1999 (4a)

STATEMENT OF THE CASE

This appeal, by the petitioner, Karen A. Briscoe, is taken from the United States District Court, of the Southern District of New York, seeking to reverse an Order and judgment granting summary judgment to the respondent, IBM, which were entered on February 22, 1999 and February 23, 1999, respectively, pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure. The Order and Judgment dismissing petitioner's complaint, should be reversed on the grounds that the District Court erred in the facts and the law, and abused its judicial discretion, because it failed to consider and admit well established relevant direct evidence and circumstantial evidence, which bear upon the respondent's racial, sexual and national origin discrimination against the petitioner and other similar conduct against other black employees, all of which bear upon the respondent's state of mind and intent. These are complicated issues of causation by the respondent, with respect to its discrimination against the petitioner and other African Americans, at the time and/or other times, in the respondent's employment, under substantially similar circumstances, pursuant

to Rules 401 and 402 of the Federal Rules of Evidence. The petitioner has, by so doing adduced the preponderance of the evidence of petitioner's disparate treatment, by the respondent.

The Second Circuit, in a perfunctory decision, merely ratified the District Court's decision and reasoning. It was obvious that the District Court gave little to no consideration or even read the petitioner's opposing motion to the respondent's motion for summary judgment, but rather it paraphrased the respondent's motion and gave it a favorable decision (4a,12a,33a).

The petitioner is alleging there are genuine issues of material facts, in dispute, of which she has an abundance of evidence in her favor, which will be adduced herein and by the testimony of many witnesses and other documents at a jury trial of her peers, which the petitioner is rightfully entitled.

Petitioner was employed by the respondent, IBM, on or about January 3, 1988, as a low level factory worker (39a). She had earned a four-year degree in Psychology, minor in Chemistry, and later two 2-year technical degrees with a straight "A" GPA. She became a member of the National Honor Society and was on the dean's list (48a-49a). Prior to working for the respondent, she was secretary and assistant manager for the Alberci Denver Company, a real estate construction developer, that built the Fishkill Marriott Residence Inn, in Fishkill, New York and later general manager of Roots Realty, Inc., where she presided over the meetings, trained staff in computers, real estate, advertising, mortgage financing, etc. (46a-49a).

Throughout much of her employment with IBM, she was the team lead, certifier on all 3 shifts, trouble shooter on many projects, supervised and managed 8 to 10 employees, presided over the department meetings, trained about 50 co-workers, was assistant director and TV anchor person for broadcasting IBM's product status at IBM East Fishkill facility, among other things, but was held at a lower pay level than the white employees she trained, who had less qualifications, responsibilities, duties and contributions to the company than she Throughout her employment with the respondent, she performed her duties in an exemplary manner (48a-51a,58a-61a).

Moreover, she authored several suggestions, which resulted in millions of dollars of savings to IBM, one of which she earned

a $65,000.00 suggestion award (39a,48a). Even though it was the custom and policy to post and publish awards and savings to IBM, the respondent would not post and/or publish her awards in any of its locations.

On or about June 29, 1995, the petitioner was told by her immediate manager that she was not promotable and that she was not going to be promoted, whereas other less qualified white employees, including her manager, had been promoted several times to higher pay levels than she (39a). Moreover, the petitioner was not allowed to take other assignments or transfers (39a-40a). Consequently, the petitioner filed this complaint with the New York State Division of Human Rights and the U.S. Equal Employment Opportunity Commission, on September 14, 1995. She was issued a Notice of Right to Sue on January 22, 1996 and filed the original action in the U . S. District Court on or about April 10, 1996 (1a,37a).

She charged that the respondent failed to promote her, in accordance with her qualifications from a level 17 to a pay level commensurate with her education, experience, responsibilities, duties and contributions, or pay level 54 when compared with the nonminorities (40a-41a). Many of the white employees she managed and trained had been promoted from 3 to 8 pay levels higher than she. In spite of her superior qualifications to that of the white employees, she had been denied promotions, all because of her race, sex and national origin, in violation of Title VII of the 1964 Civil Rights Act, as amended, pursuant to 42 U.S.C. sections 2000e, et seq. and 42 U.S.C. 1981. The petitioner was promoted one level after she brought this action, which fell far short of a promotion to manager, or an equivalent position to which she was then assigned and performing, as was customarily done to black employees at IBM (37a,39-41a,46a-51a,58a-61a).

The petitioner, after having filed this action, experienced more instances of racial, sexual and national origin discrimination, harassment and further abuses, which were intensified after filing this civil rights action, moved the lower Court for and received permission to file an amended complaint on March 16, 1998 charging related retaliatory activities (41a-43a). Because her manager conspired with other employees to undermine her supervisory authority, IBM's doctor-employee was abusive to

petitioner and her caretaker, and the respondent's refusal to permit her to work at home, because of a chemical illness contracted in the work place, as was provided to other IBM employees (43a-44a,52a).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The Petitioner Managed Her Department From 4 To 5 Years, With A Pay Level Of 17, Where The Official Minimum Pay Levels For The Position Were 52 To 54, All in Violation Of The Equal Pay For Equal Work Act, 29 U.S.C.A. §206.

Clearly the Second Circuit erroneously adopted the District Court's decision, without due consideration for the facts and law, in this case. There is no doubt, but that the petitioner was better qualified than her white co-workers because she managed and trained them, but they were promoted from 3 to 8 pay levels higher than she. Their promotions were not acquired from job-posting requests. Moreover, she was not allowed to transfer, take assignments or be promoted to a position outside of her department. The McDonnell Douglas case, infra, needs to be revisited, so as to take in account the denial of petitioner's transfers, assignments, and promotion to the pay level of the position she had done, in an exemplary manner, from 4 to 5 years.

Under that case, in order for the petitioner to state a prima facie case under Title VII the petitioner must show that (1) she belonged to a protected class; (2) her job performance was satisfactory; (3) she was subjected to adverse employment decision; (4) the failure to promote her occurred under circumstances giving rise to an inference of unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 802; *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253; *Quaratino v. Tiffany & Co.*, 71 F 3d 58, 64. The petitioner has satisfied all four requirements of the case; therefore, the respondent's failure to promote her gives rise to an inference of unlawful discrimination. Such inference must not require that she be flawless, as was required by the respondent, who did not require same of the white recipients.

Throughout this case the petitioner has alleged that the respondent would not promote her to a position commensurate with her education, experience, responsibilities, duties and contributions to IBM. The respondent subjected the petitioner to disparate treatment, in the form of assigning the petitioner to a management position and many other jobs, for about 5 years without due compensation and recognition (10a-11a,48a-51a,58a-61a). Here, the petitioner was, in substance, managing a department for about 5 years, with a 17 pay level while the official pay levels of the position were 52 to 54 (10a-11a,48a-51a,58a-61a). Therefore, petitioner was denied equal pay for equal work.

In *County of Washington et al. v. Alberta Gunther at al.*, 452 U.S. 161, 101 S. Ct. 2242, the U.S. Supreme Court held, that the Bennett Amendment does not restrict Title VII's prohibition of sex-based wage discrimination for claim of equal pay for equal work. Female clerks made prima facie case showing violation of Equal Pay Act, upon showing that they made less money than their male counterparts; employer's violation of Equal Pay Act (29 U.S.C.A. §206(d)(1)) was willful and employer failed to rebut employees' prima facie case. *Glenn, Johns and Nugent v. General Motors Corporation, Saginaw Steering Gear Division*, 841 F 2d 1567. Moreover, private employers will not be treated differently from public employers in determining whether the Equal Pay Act (29 U.S.C.A. §206) established requirement was met. *Forsberg v. Pacific Northwest Bell Telephone Co.*, 622 F. Supp. 1150; *Grumbine v. United States, et al.*, 586 F. Supp. 1144. The New York State Supreme Court, Appellate Division, held that: "violation of right to equal pay for equal work was continuing wrong and was not barred by statute of limitations; employees were not required to file notice for violation of right to equal pay for equal work; and employees could replead claims for violation of right to equal pay for equal work, retaliatory conduct, and defamation". *Summers and Matwyshen v. County of Monroe*, 537 N.Y.S. 2d 703; *Patrowich v. Chemical Bank*, 63 N.Y. 2d 541, 542, 483 N.Y.S. 2d 659.

Based on the observation of the documents provided by the respondent during discovery, it doesn't take a rocket scientist to conclude that IBM has an obvious pattern and practice of racial discrimination against its African American employees, of which

the petitioner is a member (6a-9a). Consequently, a jury could certainly find, after considering the qualifications of the respondent's white and black employees, of which the petitioner is a part, that its promotion policies are flawed and is racially motivated.

The Court denied petitioner's request to acquire more employees' records, as irrelevant, but, on the other hand, it disregarded the evidence of the employees' records adduced, as too few for consideration (2a-3a). Moreover, the Court gave little to no consideration for the petitioner having saved IBM millions of dollars and by so doing earned a $65,000.00 suggestion award, which she had to share with another non-African American, by adding her name to the suggestion, in order to be paid. Even then, the suggestion award was not officially announced, published, and posted even though small suggestion awards were regularly done so (39a,48a).

Again, the Court has abused its judicial discretion in denying the evidence of the petitioner's extraordinary abilities and skills in technical matters, of which there are issues of material facts, in dispute, as to her superior qualifications and contributions, which qualified her to be promoted to a pay level of 52 to 54.

The petitioner filed an internal grievance in which the arbitrator concluded that she should have been given the next engineering assignment, but he and the respondent failed to follow up. Thus, IBM is liable for the discriminatory conduct of its managers, because upper management was well aware of petitioner's internal grievances, but did nothing to resolve the bias and harassment against her. Under anti-discrimination provision of Title VII, an employer is subject to vicarious liability to victimized employee, where supervisors create hostile environment and no tangible employment action is taken to prevent or correct the conduct, thus the doctrine of Respondeat Superior applies. *Beth Ann Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 864 F. Supp. 1552, 76 F 3d 1155.

There is a great disparity between the promotions of white and black employees at IBM (6a-9a). "Results of the statistical evaluation suggests that African-American employees, at the time, on average were receiving from $386 to $480 less per month,

depending on the group considered, than other employees in the division" (10a-11a).

There is a genuine issue of material fact regarding the amount and kind of the petitioner's legitimate absenteeism for one year, 1995, of her employment. The Respondent used petitioner's absenteeism disability rates that falls outside the statutory 300 days period as a reason for not promoting her. The respondent does not allege that she was intentionally abusing sick leave. Moreover, if her absenteeism was valid, why were many employees laid-off and the petitioner was retained? Yet, in this instance it was used against her and therefore it demonstrates a clear bias on respondent's part. Furthermore, the petitioner's illness arose out of and in the scope of IBM employment, yet she has not been able to get more than $50,000.00 of medical bills paid, even though the Worker's Compensation Board has ruled in her favor (42a-43a).

The Court denied the petitioner's request to have IBM produce its logbooks. If the respondent had produced the attendance logbooks, as requested, they would have shown accurate records of the petitioner's attendance percentage, and that her attendance was higher than alleged and much better than most of the employees, who were working for her (2a-3a) . IBM had a policy of giving employees time off for doing good jobs or small bonuses, but now they are using that policy to condemn her and to deny promotion. If she were such a poor worker with high absenteeism why did IBM retain her during the major downsizing in IBM East Fishkill when thousands of employees were laid off (54a-57a)?

Summary judgment is not proper if there are genuine issues as to any material fact and the moving party is not entitled to summary judgment as a matter of law. The evidence herein was derived from the pleadings, depositions, interrogatories admissions and witness affidavits and at least 23 others will testify, whose testimonies will prove that the petitioner was indeed discriminated against. The witness affidavits, exhibits and evidence clearly show that there are genuine issues of material facts, with respect to the level of education and experience between the petitioner and the white employees, who have been promoted at faster and higher pay levels than the petitioner (6a-9a).

The lower Court should have assessed the records and

documents in a light most favorable to the non-movant party and drawn all factual inferences in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505. However, the non-movant party, as here, bears and has, in fact, succeeded, in her burden of proof to demonstrate that there are genuine issues of material facts, in dispute, in this case. *Celotex v. Catrett*, 477 U.S. 317, 322-23.

In order to avoid summary judgment, petitioner need not prove that the purported reasons were pretextual, but merely needs to raise an issue of material fact as to this question. Only where the evidence plaintiff puts forth to show pretext is so slight that no reasonable jury could find in plaintiff's favor is it appropriate to grant summary judgment. *Gallo v. Prudential Residential Services*, 22 F.3d at 1224.

Inasmuch as, intentional racial, sexual and national origin discrimination constitute complicated issues of causation, the petitioner shows by the relevant evidence on documents from IBM, that other minority employees in IBM were, also, discriminated against by IBM, on their jobs at other times, under substantial and similar circumstances, which are deemed admissible herein and at trial.(6a-9a,50a-51a,54a-57a). (Pursuant to Rules 401 and 402 of the Federal Rules of Evidence).

The petitioner has shown that she has the requisite education and experience and had been performing the position, as supervisor, trained about 50 of her co-workers and had maintained a "2" appraisal rating, from a hostile manger, for about 5 years, thus, she has proven that there are genuine issues of material facts, in dispute, that should be tried by a jury of her peers.

Credibility, determinations, weighing of evidence, and drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether his ruling is on motion for summary judgment or for directed verdict; evidence of the non-movant party is to be believed and all justifiable inferences are to be drawn in her favor. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 106 S. Ct. 2505. Moreover, said the Court a trial Court should not act other than with caution in granting summary judgment and may deny summary judgment where there is reason to believe that the better course would be to proceed to a full trial. *Anderson v. Liberty Lobby, Inc.* Supra.

II. The Respondent Required The Petitioner To Be Flawless Or Perfect To Satisfy The Prerequisites For The Job-posting Positions Available

It took, on average, 5 to 6 years longer for blacks to get promoted than whites (6a-9a). The petitioner was well qualified for the Laser Via Inspection Engineering position, because it was part of her daily job, and she supervised others on lasers (46a-49a). The petitioner has more than proved and demonstrated her superior education and experience for this position, to no avail (50a-51a,58a-61a). The petitioner need only to show that she possessed the basic skills necessary for the performance of the job. *Powell v. Syracuse University*, 580 F.2d 1150, 1155 (2d cir.) cert. denied, 439 U.S. 984 (1978).

The petitioner applied for but failed to receive the Program Administrator position. There was no question but that she qualified for this position, nor does the respondent deny her qualification. This was an entry level position, with a 52 pay level. It required only a batchelor degree and no prior experience was necessary (48a-49a). She was denied this position and the respondent did not disclose the recipient of the position, which was very commonly done to black employees in the company. Again, the respondent required the petitioner to have a perfect score, but not the white recipients. Therefore, even though she qualified, she was denied the position, because of her race, sex and national origin.

The petitioner failed to receive the Human Resources Manager Position. With respect to this position, the Court, in all due respect, erred by ruling that the petitioner was not qualified for this position, because in substance she didn't have the requisite educational background. She scored on average within 1 point of the proficiency levels requested and equal on some (46a-49a). Again, the respondent required the petitioner to have a perfect score, but not the white recipients. The scores were at best subjective, therefore she could have very well qualified for this position, depending on who evaluated the result. But the Court only considered the facts and opinions of IBM in the matters, and it appears, without giving any considerations to the petitioner, all

because of IBM's power, wealth and influence.

More importantly, the requested educational preference was a 4 year degree. At the time of her application petitioner had a 4 year degree in Psychology and two 2-year technical degrees. She managed from 8 to 10 employees (46a-51a,58a-61a). The experience requirements for this position were as follows: self sufficient, result oriented individual with leadership skills. The petitioner managed her department for about 5 years, presided over the department meetings, trained staff, among many other positions. Therefore, there are genuine issues of material facts in dispute, with respect to petitioner managing her department in an exemplary manner and not earned a promotion, thereon (50a-51a,58a-61a). Thus, her case should be decided by a jury trial of her peers.

"Where employers have instituted employment tests and the qualifications with an exclusionary effect on minority applicants, such requirements must be 'shown to bear a demonstrable relationship to successful performance of the jobs' for which they were used" *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 28 L Ed 2d 158, 91 S Ct. 849; *Castro v. Beecher*, 459 F 2d 725; *Chance v. Board of Examiners*, 458 F 2d 1167. In the case at bar, the qualifications for the positions are subjective, without valid and relevant tests on the positions; therefore, the applicants are not sure of their qualifications nor was the respondent. The selections for the positions were mere conjectures, without proper foundation and lend themselves to abuse, manipulations and discrimination, because of race, sex and national origin, of which the petitioner herein are contending. *McDonnell Douglas, Inc. v. Green*, 411 U.S. 792, at 678.

Moreover, the Court only considered one and the least used method of promotion at IBM. Most of the respondent's promotions are earned by on the job performance and not by a specific request for posted position (6a-9a). Thus, *McDonnell Douglas*, supra, is distinguished from the method of promotions at IBM. The *McDonnell Douglas* case is more prevalent to civil service and union type positions, where the request for and passage of civil service and unions' tests determine promotions, but not in private industries, such as IBM.

The lower Court held that the petitioner could only be

promoted by requesting a position from job-postings. The vast majority and normal methods of being promoted at IBM are not through job postings, but rather through an on-the-job performance and making contributions to the company's bottom line (6a-9a). The respondent's allegations that promotions, in IBM, are only made by requests for specific positions, are ludicrous and thus, a pretext and a sham, for justifying its racial, sexual and national origin discrimination against the petitioner. Promotions, in IBM, from job postings are rare and are instituted where promotions or placements are not practical or available in a department.

In order not to enable her to be promoted and/or transferred or assigned, her manager falsified and changed her appraisal rating to a "3" after the petitioner had signed a rating of "2" and her absentee records, which included 23 days of sick leave, due to serious surgery to both feet, from 13% to 34%, all for the purpose of denying the petitioner promotions, transfers and assignments. In the case of *Kirschner and Greif v. Office of The Comptroller of the City of New York*, 973 F. 2d 88, the Court held that the jury could have inferred prima facie case of discriminatory promotion policies, because written evaluation of petitioner's job performance had been altered. Thus, the *McDonnell Douglas* case, supra, is relevant to only a very small minority of promotion cases, especially, in IBM. Again, there are genuine issues of material facts, in dispute, with respect to the method used to promote employees at IBM, that warrant a jury trial by her peers.

Further, the respondent claimed and the Court held that "a departmental wide freeze on promotions and transfers rendered everyone in her division "unqualified" for promotions, at the time"; but during the "so-called" freeze, from 1992 through 1994, non-minorities were promoted (6a-9a). Again, in all due respect to the Courts, they have abused their judicial discretion in giving undue weight to the respondent's allegations and little to no weight to the petitioner's evidence, as corroborated by the respondent's own documents. While the Court cannot try issue of facts, it can only determine whether there are issues to be tried, *Heyman v. Commerce and Industry Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975). These facts constitute genuine issues of material facts, in dispute, as to whether the white employees promoted were better qualified than the petitioner.

The petitioner was also denied the position of Plasma Process Engineer. With regard to this position, the Courts, in all due respect, erred by ruling, again, that the petitioner was not qualified for this position, because in substance she did not have the requisite educational background. The petitioner had 3 degrees and scored, on average, within 1 point of the proficiency levels requested and equal on some (46a-49a). There are genuine issues of material facts to be tried by a jury, as to whether she had to be flawless to quality, as opposed to the white applicants.

The respondent has not adduced a shred of credible evidence that the recipients of this position were qualified, let alone better qualified than the petitioner. The skill proficiency level requested for the Plasma Process Engineer included four categories. Petitioner met two out of the four of the requested proficiency levels and scored at only one level below the requested levels for the remaining two categories (46a-49a). The petitioner need only to show that she possessed the basic skills necessary for performance of the job and not that she is flawless or perfect. *Powell v. Syracuse University*, 580 F.2d 1150, 1155 (2d Cir.) *cert. denied*, 439 U.S. 984 (1978).

Further, the Court should have considered the fact that much of the respondent's alleged evidence were documents generated by the respondent in anticipation and during litigation. The respondent has not adduced a shred of credible evidence that the recipient of this position was qualified, let alone better qualified than the petitioner.

The petitioner was, also, denied the position of Operation Manager. when the petitioner applied for the Operations Manager position, the requested proficiency skill level for being self directed was a five and she was deemed by IBM to be a level five and her proficiency levels for the other criteria were slightly below the proficiency requested (46a-49a). The petitioner scored, on average, within 1 point of the proficiency levels requested and equal on some. Again, these scores are at best subjective, the petitioner could have very well qualified for this position, depending on who evaluated the result. The petitioner met three out of the eight of the requested proficiency levels and scored at only one level below the requested levels for the remaining five categories (46a-51a,58a-61a).

To satisfy the second element of the requirements, petitioner need not show that her qualifications are flawless or perfect, but rather, that she needs only to show that she possessed the basic skills necessary for the performance of the job, as was required by the white recipients. *Powell v. Syracuse University*, supra).

Again, the Courts have erred, abused and exceeded their judicial discretion. There are genuine issues of material facts, in dispute, as to the respondent's motive in promoting the white recipients and denying this and all of the other positions to the petitioner, a black female. The petitioner is better qualified than most of her white co-workers therefore, the only plausible explanation for the denial is because of her race, sex and national origin, which give rise to genuine issues of material facts, in dispute, to be determined by a jury trial of her peers.

Moreover, there are genuine issues of material facts with respect to the petitioner not being allowed to go on assignments and/or transfer or to pursue promotions, whether in or outside of her department. This, the Courts failed to address in their decision (39a). The case of *McDonnell Douglas v Green*, supra, needs to be revisited, because the lack of opportunity to request promotions constituted disparate treatment of the black employees and thus the petitioner.

III. The Lower Court Erred When It Dismissed Petitioner's Complaint Without Considering The Failure Of The Respondent To Post Job Openings, Where There Are Genuine Issues Of Material Facts, In Dispute, As To Whether All Job Openings Were Made Available To Minority Employees, Of Whom The Petitioner Is A Member.

The petitioner's case is distinguished from that of *McDonnell Douglas v. Green*, supra because that case did not address the concealment of open positions from minority employees, that were disclosed to white employees. Thus the petitioner was denied the opportunities to apply for many positions, which she and other minorities were not aware. It is all but

impossible to prove the negatives.

Under such system the minority, requesters, had but little opportunities, if at all, whether qualified or not, especially, when many jobs are not posted. In view of the employer's failure to post openings and in view of the possibility of discrimination resulting from that failure, it was appropriate to consider the lack of job postings, with respect to petitioner's claim of discrimination in promotions (6a-9a) . In *Rossini v. Ogilvy & Mather, Inc.*, 597 F. Supp. 1120 and in the case of *Ste. Marie v. Eastern Railroad Assoc. & Traffic Executive Assoc.*, 458 F. Supp. at 1163-64, the Courts held that the failure to post openings, the ad hoc and home made job evaluations and tests, the subjective nature of the procedure for assignments and promotion, and the total discretion accorded department heads to decide who to advance were viewed as supportive of the overall finding that a discriminatory pattern or practice existed.

The defendant, in *Walker v. New York Office of Mental Health, Rockland Psychiatric Center*, (Cite as: 1998 WL 639392 (2d Cir. (N.Y.)), *case unpublished*, a case strikingly similar to this case, appointed employees to higher positions, based on racial relationship, the court held, in substance, that many of the appointments were made subjectively, based upon prior relationships and working experience which the successful applicants had with the appointing officials. In doing so the defendant violated its own posting requirements and internal regulations and rules for the filling of such positions. These circumstances certainly give rise to a suspicion and a suggestion that race may have played a role in the employment decisions in question since greater possibilities for abuse are inherent in the utilization of such subjective values.

In the case at bar, none of the white employees' promotions cited in documents provided, by IBM, during discovery, were posted (6a-9a). In *Grant v. Morgan Guaranty Trust Company of New York*, 638 F. Supp. 1528, the Court held that the lack of objective guidelines for promotion and failure to post notices of job vacancies are badges of discrimination that serve to corroborate racial bias. *Brown v. Gaston County Dyeing Mach. Co.*, 457 F 2d 1377 (4th Cir.), *cert denied*, 409 U.S. 982,

93 S. Ct. 319, 34 L. Ed. 2d 246. Thus petitioner has established a prima facie case, by showing that promotions are not from job postings, but rather, from allegedly, on-the-job-performance, for the vast majority of promotions in IBM. Again, there are genuine issues of material facts, as to whether all of the job openings were available to the black employees, of which the petitioner was a member (6a-9a).

Furthermore, the petitioner applied for none job-posted and other job-posted positions. All of which were denied for one reason or another, mostly because her manager would not release her for other job assignments and/or transfers. The respondent has records of these requests, but refused to acknowledge them. Moreover, job-postings were a new phenomenon in IBM. The great majority of promotions in the petitioner's department were not from job-posting (6a-9a). At any rate, the petitioner and the majority of IBM employees, including the employees cited herein, were not promoted from job-postings, but rather, were allegedly promoted based on their job performance, mastering their jobs and contributing to the company's assigned missions.

Moreover, the petitioner's case is otherwise distinguished from the *McDonnell Douglas* case, supra, because she requested to be promoted, in substance, to the position of the job she was performing and had done for about 5 years, i.e. managing the department at a 17 pay level while the official pay levels of the position were 52 to 54, after all, all of the positions she had applied for had been denied, some of which were denied because she was not allowed to transfer or to take assignments (46a-51a,58a-61a).

As in *McDonnell Douglas Corporation v. Green*, supra, at p. 678, IBM does not dispute the petitioner's qualifications for the position of supervisor, which was equivalent to manager. She was performing that position for about 5 years, so there is a genuine issue of material facts, in dispute, as to why the petitioner was not promoted to manager, a position commensurate with her duties for that period, if not, for the reasons of race, sex and/or national origin discrimination (46a-51a, 58a-61a). The respondent's non-discriminatory business reasons have not rebutted these inferences of racial, sexual and national origin discrimination against the petitioner.

Furthermore, in this case, there is no certainty that the recipients of said positions, were better qualified than the petitioner or they met all of the criteria of the positions, because no qualifying tests were conducted (6a-9a). In *Castro et al v. Beecher*, 459 F. 2d 725, the Court held that where black and Spanish-surnamed applicants had failed one or more police examinations which discriminated against them, basic principles of relief would be that a new examination be made available to all applicants". In the case at bar, the petitioner was discriminated against, because no test was conducted or actual credible evidence was adduced to substantiate the qualifications of the recipients of the positions. In the case of *Chance et al. v. The Board of Examiners*, 458 F. 2d 1167, the Court held that evidence in action seeking to enjoin use of examinations prescribed and administered, established prima facie case of de facto discrimination, such examination was not justified by the examining board. The qualifications of the recipients herein have not been justified by any objective criteria, by the respondent, thus, the petitioner has established a prima facie case, to which the respondent has no plausible justifications. There are issues of material facts, in dispute, with respect to whether the recipients of the positions were qualified, for the positions requested, in the absence of relevant qualifying tests. Therefore, the District Court abused its discretion, when it determined the credibility, weight of the evidence and drew inferences from those facts, which was the jury functions, not the judge. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505. The lower Court went beyond its judicial authority when it granted summary judgment in this case, where there were genuine issues of material facts, in dispute, with respect to the recipients of the positions being better qualified than the petitioner.

Moreover, the lower Court did not take into account the fact that petitioner was not permitted by her manager to accept any positions or assignments, if offered or to transfer (40a). Based on IBM's admissions in file, the petitioner's manager, who was white, a high school graduate, with her immediate prior experience as a Dunkin Donuts waitress before working for IBM and, while manager at IBM, came onto the floor about four (4) to five (5) times a year, and relied on the petitioner to manage her department with a 17 pay level while her manager was 7 to 8 pay levels above

the petitioner (46a-51a,58a-61a). In other words, in spite of her shortcomings, IBM gave her 7 to 8 pay levels higher than the petitioner. Moreover, IBM has promoted many white employees to higher official positions, regardless of their educational levels, but requires black employees to be much more educated and experienced than they, just to hold lower level positions, as was clearly its intent for the petitioner (6a-9a).

Petitioner has shown that she is a black female, possessed the necessary qualifications and the best qualified for each of the positions, because she was supervisor/manager over many related criteria that she applied for (46a-51a,58a-61a). There is no dispute that petitioner was rejected for these positions and/or many others, some of which were and others not posted, but IBM accepted applications from white persons less qualified than she. Petitioner's burden of asserting a prima facie claim is de minimis and was met; therefore, the petitioner has established a prima facie case and successfully rebutted the respondent's non-discriminatory reasons for not promoting her to a position commensurate with her education, experience, responsibilities, duties and contributions. *Dister v. Continental Group, Inc.* 859 F.2d 1108, 1114 (2d Cir. 1998).

IV. The lower Court Abused Its Discretion, When It Dismissed Petitioner's Complaint, With Respect To Her Charges Of Retaliation Against Her, By IBM, When There Are Issues Of Material Facts, In Dispute, As To Whether The Respondent's Retaliatory Activities Against Her, Were Because She Filed This Civil Rights Action.

An action for retaliation may be brought under Title VII, pursuant 42 U.S.C. § 2000e-3(a). "It is unlawful for an employer to retaliate against an employee for filing a charge pursuant to Title VII." In *Torres v. Pisano*, 116 F. 3d 625, 639 (2d Cir.) *cert. denied*, 118 S. Ct. 563 (1997), on a motion for summary judgment the court held, 1) a plaintiff must demonstrate a prima facie case of retaliation, 2) defendant then has the burden of pointing to evidence that there was a legitimate, non-retaliatory reason for defendant's action and 3) if the defendant meets its burden, the

plaintiff must demonstrate that there is sufficient potential evidence for a reasonable jury to find the proffered legitimate reason is merely a pretext for impermissible retaliation. In order to establish a prima facie case of unlawful retaliation, a plaintiff must show: 1) a participation in a protected activity known to the defendant; 2) the employment action disadvantaged the plaintiff; and 3) a causal connection between the protected activity and the adverse employment act. *Torres v. Pisano*, supra, at 639.

In *Shah v. New York State Department of Civil Service*, Docket No. 98-7097 of the United States Court of Appeals, (1999), unpublished, the Court held that retaliation claims were reasonably related to the allegations of employment discrimination in the earlier administrative complaint filed with the EEOC, so that Court had jurisdiction. Moreover, it is well established that even when a charge of discrimination is without merit, an employee or applicant is still protected by Title VII in making the charge, that one may not be retaliated against, *Cohen v. Community College of Philadelphia*, 484 P. Supp. 411, 429.

1. IBM Denied The Petitioner The Right To Work At Home, Because of Her Limited Disability, As Was Done For Other Employees.

It is a well known fact, by many employees and the public that IBM employees, who are sick and/or for other valid reasons, who have some knowledge of operating computers are permitted to do the same or other type jobs on computers at home or elsewhere (62a). In spite of the fact, the petitioner was over exposed to chemicals on IBM's premises, is suffering from Chronic/Acute Toxic Chemical Exposure, is proficient and trained others on computer operations, the respondent rejected her request, to work at home or elsewhere, even though the respondent has and still is accommodating other employees, for years, all because it intended to and still is retaliating against her because she filed this civil rights action against the respondent, all in violation of Title VII, pursuant to 42 U.S.C. § 2000e-3(a). Furthermore, she has been threatened with discharge from the company, if she can not return to a dangerous chemical environment.

2. The Petitioner's Manager Conspired With Other Co-Workers To Undermine Her Supervisory Or Managerial Authority

The petitioner's manager, after having assigned her to be supervisor of the department about 4 years earlier, conspired with the non-minority employees to encourage them to disobey her instructions and not work for her, even though she had the apparent authority so to do, she would not reaffirm her authority or announce her authority and were to be obeyed, but rather she would not support her or stop her co-workers from calling her names, i.e. slut, etc., but instead, participated in the scheme and thereby harassing and creating a hostile environment for the petitioner (41a). Her co-workers started the harassment and intimidation a few months before the filing of this case and it continued and became more intense after she filed this civil rights action in 1995 (41a).

At least 23 other witnesses can testify to the facts in this matter, if given an opportunity to do so, at a jury trial.

3. IBM's Doctor-Employee Disregarded Petitioner's Medical Restrictions And Subjected Her To A Harmful Environment And Was Abusive To The Petitioner And Petitioner's Caretaker.

Upon information and belief, Dr. Olenen is a medical doctor and an employee of the respondent. Dr. Olenen refused to respect and observe petitioner's medical restrictions of her attending physician, who required her to remain indoors and not to be exposed to a chemical environment, such as Dr. Olenen's clinic, because of her recent medical treatment requirements that she stay indoors and in isolation from contaminants, but Dr. Olenen would not schedule her appointment to another day, permit her to stay in her car until her turn and by so doing he subjected her to a prolonged and harmful chemical condition and he was very abusive to her caretaker, it is believed, because of her filing this civil rights action (52a).

In spite of all of these retaliations and others against the

petitioner, by the respondent, the lower Court abused its discretion, by dismissing her complaint, even though, there were genuine issues of material facts, in dispute, that warrant a jury trial by her peers.

The petitioner has a constitutional right to a jury trial. Therefore, the District Court abused its discretion, when it determined the credibility, and weight of the evidence and drew inferences from those facts, which were the jury functions, not that of the judge; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505. The lower Court went beyond its judicial authority when it granted summary judgment in this case, where there were genuine issues of material facts in dispute, with respect to the recipients of the positions being better qualified than the petitioner.

The Court's decision to engraft the standard of proof applicable to a factfinder onto the law governing the procedural motion for summary judgment, a motion that has always been regarded as raising a question of law rather than a question of fact, will do great mischief with little corresponding benefit to the people of this country, the primary effect of the Court's opinion today will likely be to cause the decisions of trial judges in the lower Courts, on summary judgment motions to be more erratic and inconsistent, and thereby will cause, as here, serious injustices to minorities, who can do little to prevent the powerful, wealthy and influential employers from over pontificating the facts, in these kinds of cases.

The Courts asserted that the grant of a motion for summary judgment raises a freely reviewable question of law. They would reverse a summary judgment if the moving party failed to establish that no genuine issue of a material fact remained for trial or if the moving party as a matter of law was not clearly entitled to prevail: *La Riviere v. Equal Employment Opportunity Commission*, 682 F. 2d 1275, (9th Cir.); *Server v. Interpace Corp.*, 657 F. 2d 1115, 1117 (9th Cir.); *Gaines v. Haughton*, 645 F. 2d 761, 769-70, (9th Cir.). In the case at bar, there are several genuine issues of material facts in dispute; therefore, summary judgment for IBM was not warranted, because IBM was clearly not entitled to prevail.

The petitioner is a person with little to no resources, yet, she has to fight IBM, with all of its wealth, power and influence,

for the rights its white employees take for granted. If minorities are going to be denied their day in court, their complaints will not be addressed; therefore, they will have no redress or recourse against racial discrimination, except for public protest or some other unacceptable means of protection. The courts are duty bound to protect the interests of all people in this country. Many of our citizens in this country are losing faith in our government and are increasingly relying on the courts to protect them. Obviously, the Federal Courts have decided not to permit minorities to have jury trials in Title VII cases, because about 90 some odd percent of them are foreclosed by summary judgment in favor of the employers.

If the courts have abolished Title VII of the Civil Rights laws, they should make a public declaration of same, so either party to Title VII cases can stop pursuing these kinds of remedies in the courts, wasting the time and incurring expenses of the courts and parties involved. Because summary judgments, in favor of the employers, are now a foregone conclusion.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari is meritorious, and should be granted, so as to require that the petitioner has a jury trial by her peers, under the United States Constitution.

Dated: January 23, 2000
Wappingers Falls, New York

Respectfully submitted,

Percy W. Briscoe, P.C.
Attorney for Petitioner
Karen A. Briscoe
152 Old Post Road
Wappingers Falls, New York 12590
(914) 298-0522

APPENDIX

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

To:

Karen A. Briscoe
11 Derrick Drive
Fishkill, NY 12524

From:

Equal Employment Opportunity Comm.
New York District Office
7 World Trade Center, 18th Floor
New York, New York 10048-1102

Charge Number - 16G955315

EEOC Representative - Kevin J. Berry

Telephone Number - (212) 748-8500

To the Person Aggrieved:

X - Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its process within 180 days from the filing of the charge.

cc: International Business Machine

X - Copy of the charge

On Behalf of the Commission

Kevin J. Berry, Enforcement Mgr. January 22, 1996

PERCY W. BRISCOE
Attorney and Counsellor at Law

152 Old Post Road
Wappingers Falls, NY 12590

(914) 298-0522
(914) 298-0520 Fax

Briscoe v. IBM 96-Civ-2657 (GAY)

Dear Magistrate Judge Yanthis:

We have discovery issues to be considered by the Court.

I realize that the discovery deadline has expired, but I have been requesting employees' job performance appraisal records from the defendant's attorney on several occasions, starting in February, 1997, on March 17, 1998 and April 7, 1998. I have today, again, asked for those records and tool log records. They have sent me a few of the employees job performance appraisal records and some reconstructed tool log records. when I asked f or an explanation they said that is the beat they can do, the record retention period for such records has expired and they aren't available. However, they did provided the plaintiff's job performance records, why not the others? They have been very selective in answers plaintiff's interrogatories and production of documents through out this whole process. They have provided me with small portions of the records requested from the beginning of the discovery period. I did not move this Court to order that they provide plaintiff with all the records, because I knew there could be some difficulties, but now I believe they were acting in bad faith.

The defendant's attorney should be required to honor plaintiff's attorney's requests, even at this late date. The employees' appraisal job performance and copies of the original tool log records, requested on April 7, 1998, after previous requests are still not provided. If you don't order them to provide them, at least, my concerns are noted for the record. See Exhibit 1, attached.

Accordingly, the plaintiff requests that the Court orders defendant to provide said records.

Respectfully Submitted,
Percy W. Briscoe
Attorney for Plaintiff

Copies Mailed 5/19/98
Chambers of Judge Yanthis

Application DENIED. Discovery deadline has expired. Also, see defendant's letter in response dated May 15, 1998.

SO ORDERED. GEORGE A. YANTHIS 5/19/98

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29th day of October, one thousand nine hundred and ninety-nine.

Present:
HONORABLE AMALYA L. KEARSE,
HONORABLE PIERRE N. LEVAL,
HONORABLE JOSÉ A. CABRANES,
Circuit Judges.

KAREN A. BRISCOE,

Plaintiff-Appellant,

- v - No. 99-7247

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellee.

Filed October 29, 1999 - United States Court of Appeals, Second Circuit.

Appearing for Appellant: Percy W. Briscoe, Wappingers Falls, N.Y.
Appearing for Appellee: John Houston Pope, Davis Weber & Edwards, N.Y., N.Y.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it herein is affirmed.

Plaintiff Karen A. Briscoe appeals from judgment of the United States District Court for the Southern District of New York, Barrington D. Parker, Jr., Judge, summarily, pursuant to Fed. R. Civ P. 56, dismissing her complaint alleging employment discrimination by defendant International Business Machines Corporation ("IBM") in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. . On appeal, Briscoe contends principally that summary judgment was inappropriate because she had adduced evidence sufficient to show that there were genuine issues of material fact to be tried. We disagree, and affirm the dismissal of those claims substantially for the reasons stated in Judge Parker's Opinion and Order dated February 22, 1999, and the Report and Recommendation of Magistrate Judge Yanthis as adopted by Judge Parker's Opinion and order.

Briscoe also argues on this appeal that IBM's conduct violated her rights under the Equal Pay Act, 29 U.S.C. § 206(d). This Claim was not asserted in Briscoe's pleadings, and we see no indication that it was raised in the district court. Accordingly, it is no properly before us. See, e.g., Rodick v. City of Schenectady, 1 F.3d 1341, 1347 (2d Cir. 1993).

We have considered all of plaintiff's contentions that are properly before us and have found in them no basis for reversal. The judgment of the district court is affirmed.

FOR THE COURT:
KAREN GREVE MILTON, Acting Clerk
by Lucille Carr

ADMISSIONS FROM RECORDS PROVIDED BY IBM

WHITE EMPLOYEES

Name	Level	Years of Service	Education/ Experience
K. Kerr	18	6	AAS Electronics/ Jerry's Supervalue Stockman
J. Danielson	15	6	AAS Computer Science UPS Local Sort
L. Garrison	18	7	AAS Data Processing Postal Carrier
T. Robinson	20	6	AAS Electronics UPS Preloader
D. Brower	20	11	ES Air Force Forklift Driver
A. Venditti	20	13	HS Salesperson Dutchess Tape
B. McCord (1994-18)	21	8	BA Communications Frame Center Sales
D. Varrone (1996-22)	20	11	HS Secretary
C. Vanek	20	6	AAS Electronic Tech
R. Anderson (1996-54)	20	13	HS Dept. store Clerk
E. Finger (1997-54)	20	8	HS Auto Parts Clerk
W. Boldrin (1994-18)	52	8	AAS Data Processing Assistant Manager Sears
R. Beisel (1996-54)	52	7	BS Psychology HS Psychology IBM temp
V. Hayden (1996-56)	55	16	HS Dunkin Donuts Waitress

BLACK EMPLOYEES

K. Briscoe Plaintiff	17	8	BS Psychology/Pre-Ned AAS Electrical Tech AAS Electro Mechanical Assistant Manager of Construction of Residence Inn By Marriott Sales Manager Real Estate/IBM Secretary
S. Fryar	15	10	HS/ Western Publishing
J. Okon	15	6	BS/MS- IBM Operator/ Real Estate
C. Heglar	15	6	AAS Data Processing/ Data Entry Operator Production Scheduler
V. Coppedge	15	6	RS/Industrial Tech Data Processing- Iron Worker local 417 IBM Operator
R. Smith- Walton	15	7	AAS Business/ Lead Word Processor Processor/ Secretary
C. McKoy	17	11	HS/ Staff Lighting
A. Cooper	17	13	HS/ Certificate Clerical /Key Punch- American Felt Machine Operator
C. Robb	17	4	BS-Physical Education AAS/ Electrical Tech Health/PE teacher
L. Byrd	17	8	BS Business Admin Assistant Manager Sherwin William
A.Sutherland	17	8	BS Business Admin US Business Credit Vassar Hospital Medical Records Clerk Patients Registration

B. Ottey	18	11	HSI College Ecology US Navy/ Printshop
D. Chapman	18	8	BA Nath/AAS Math MS Computer Science IBM Operator
G. Boykin	20	15	AAS Business Manage Credit Engineering Sewing Inspector
R. Staples	20	7	AAS Drafting & Design AAS mechanical Tech BS Electronic Engineer MS Computer Engineer US Navy

COMPARISON OF BLACK VS WHITES TIME IN LEVEL 17 POSITION

BLACKS		YEARS LEVEL 17
Dean Chapman	1990-1993	3
Charles Robb	1991-1997	6
Ann Cooper	1986-1998	12
Anita Sutherland	1992-1998	6
Karen Briscoe	1991-1996	5
Sylvia Fryar	1988-1993	5
Curtis McKoy	1991-1998	7

AVERAGE = 7.33 YEARS MONTHS = 87.9 or 88

WHITES		YEARS LEVEL 17
Don Brewer	1989-1990	1
Richard Anderson	1985-1989	4
Warren Boldrin	1991-1993	2
Ann Marie Venditti	1987-1989	2
Bob McCord	1989-1992	3
Victoria Hayden	1982-1984	2
Durinda Varrone	1989-1990	1

Rita Beisel	1991-1993	2
Karl Kerr	1989-1991	2
Jeff Danielson	1989-1991	2
Larry Garrison	1990-1994	4
Tim Robinson	1988-1989	1

AVERAGE = 2.16 YEARS MONTHS = 25.99 or 26

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN A. BRISCOE,

Plaintiff,

- against -

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

STATE OF NEW YORK
COUNTY OF WESTCHESTER

THOMAS K. FITZGERALD, being duly sworn, deposes and says:

1. I am an economic consultant holding a Doctor of Philosophy in Economic from Rutgers University and specializing in evaluating liability and loss issues in various types of litigative claims. A curriculum vitae is attached as Exhibit A to this affidavit.

2. I have been retained by Plaintiff's Counsel to review Employee History Records of selected employees, provided by the Defendant, working in its Microelectronics Division, for purposes of determining whether there is any evidence of race-related disparities in the salaries paid to these workers.

3. The analysis focussed on all of those division employees, whose Employee History Records were supplied by the Defendant, that were employed there in September 1995, when the plaintiffs complaint was filed.

4. A subset of this group, employed at Levels 15 through 21, was also evaluated.

5. Variations in monthly salaries were related to race, while controlling for such factors as years of services, education, sex, and age.

6. In both evaluations, the race variable was statistically significant at well below the 5.0-percent level suggesting a rejection of the hypothesis that the level of salaries at the date of filing were independent of race.

7. Results of the statistical evaluation suggest that African-American employees, at that time, on average, were receiving from $386 to $480 less per month, depending on the group considered, than other employees in the division.

THOMAS K. FITZGERALD, PH.D.

Sworn to before me this
29 day of May 1998.

Jerome Cimino
Notary Public, State of New York
No. -4635677
Qualified in Rockland County
Commission Exp. 5-31-98

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN A. BRISCOE,

Plaintiff,

-against-

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

REPORT AND RECOMMENDATION
96-CV-2657 (BDP)(GAY)

TO THE HONORABLE BARRINGTON D. PARKER, JR., UNITED STATES DISTRICT JUDGE:

The following facts are taken from the parties' statements pursuant to Local Civil Rule 56.1 of the United States District Courts for the Southern and Eastern Districts of New York, and.from the pleadings, affidavits, affirmations, depositions and exhibits submitted by the parties. Plaintiff has brought the following claims:

Failure to Promote Claims: Plaintiff, an African-American female, claims defendant hired her at a comparatively substandard pay level than other white male employees, and stunted her professional advancement within the company by engaging in a pattern and practice of employment discrimination upon the grounds of race, sex, and national origin in violation of 42 U.S.C. § 2000(e) et seq. [hereinafter "Title VII" and 42 U.S.C. § 1981 [hereinafter "§ 1981 "]. Specifically, plaintiff claims defendant delayed her promotion to level 18 until February 1996, which forced her to remain at level 17 for a longer period of time than her white male counterparts. Plaintiff also claims that despite her

qualifications for the positions of Laser Via Inspection Engineer, Operations Manager, Plasma Process Engineer, and Human Resources Administrator, defendant awarded said positions to other candidates upon the grounds of race, national origin and gender. Finally, plaintiff claims defendant filled a lateral position based in Raleigh, North Carolina upon said grounds.

Retaliation Claims: Plaintiff claims defendant subjected her to retaliation for filing complaints of discrimination with the Equal Employment Opportunity Commission [hereinafter "EEOC"] and for instituting the instant lawsuit in federal district court. Specifically, plaintiff claims defendant conspired to undermine her authority; to expose her to dangerous toxic chemicals; to deny her workers' compensation and medical benefits; to subject her to abusive treatment by a medical doctor and nurse [claimed to be agent[s] of defendant]; and to refuse to accommodate her medical restrictions by denying her request to complete work assignments at home.

1. FACTUAL BACKGROUND:

Defendant hired plaintiff in 1988 as a level 13T Manufacturing Production Operator Trainee at its Microelectronics Division in East Fishkill, New York. Her duties included manufacturing electrical cards, boards and other electrical components for mainframe and personal computers. Plaintiff's background at the time of hire was as follows: real estate salesperson, assistant manager for a real estate construction company, department store clerk, secretary, and advertising coordinator. Plaintiff also held a four-year degree in Psychology from Howard University.

On June 26, 1 995, plaintiff alleges that she was informed by her first line/immediate manager, Victoria Hayden, that she would not receive a promotion to level 18. Plaintiff attributes said decision to a pattern and practice of affording higher evaluations, promotions, and recognition to white males within the company. In support, plaintiff contends her educational background was superior to those promoted before her, that her work performance was exemplary, and that co-workers highly respected her proficiency and leadership abilities.

IBM contends that educational background alone is not the sole criteria used to promote individuals within the company, and

that the backgrounds of those promoted were better suited to each available position at the time of promotion. IBM also contends that plaintiff's employment record within the company illustrates a history of high absenteeism, personal problems, and mediocre performance ratings which validate all employment decisions regarding plaintiff to date. For example, defendant cites plaintiff's year-end absenteeism rates as follows: 9.3% in 1988; 5.8% in 1989; 10.17% in 1990; 9.77% in 1991; 4.43% in 1994; and 16.11% in 1995. Plaintiff claims her overall rate of absenteeism, although calculated to be 34%, is actually 4% upon factoring in legitimate sick leave for foot surgery and prior back injuries. Defendant also contends plaintiff received consistently unremarkable performance ratings in the "2" to "3" range on a scale of "1 " to "4" -- one being the highest, and four being the lowest. Defendant further cites plaintiff's absence from work for drug rehabilitation[1]; problems with alcohol abuse; attempted suicide; partial disability from a car accident and foot surgery; and reoccurring back problems. Defendant claims said problems adversely affected the scheduling, quality and consistency of plaintiff's work, and had a negative impact upon her attendance record. Plaintiff suffered from numerous health problems during her employment that limited the nature and duration of employment duties plaintiff could undertake. In March 1995, plaintiff was restricted from lifting panels on certain equipment. In April 1 995, plaintiff was restricted from lifting objects greater than twenty pounds, using a microscope for prolonged periods of time, and from unnecessary physical movement. In May 1995, plaintiff worked half-shifts each week, did not engage in heavy lifting, and did not walk or stand unless absolutely necessary. Between July and September 1995, plaintiff was further restricted from microscope use, heavy lifting, and prolonged sitting or standing. As of March 1997, plaintiff placed herself on "sick leave" due to claimed multiple chemical sensitivity disorder" from chemical exposure in an area called the 'clean room" on defendant's premises. To date, plaintiff has not yet returned to

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[1] Plaintiff participated in a drug rehabilitation program for cocaine abuse.

work.

Plaintiff's advancement record is as follows: defendant promoted plaintiff to a level 13Q Production Operator position in December 1988, to a level 15Q Senior Production Operator position in November 1989, to a level I7Q Production Specialist Position in November 1991, and to a level 18 Senior Technician position in the Advanced Semiconductor Technology Center in February 1996. Plaintiff contends defendant did not promote her from level 17 to level 18 on a timely basis; denied her promotions to at least four specific positions; and retaliated against her for filing complaints against the company on the grounds of race, national origin and gender. Defendant contends all employment decisions were based upon merit and employment record, disputes each claim of retaliation, and has moved for summary judgment upon all claims.

II. DISCUSSION

A. Standard of Review

Summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The court assesses the record in the light most favorable to the nonmovant and draws all factual inferences in its favor. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986). The non-movant bears the ultimate burden of proof to demonstrate that there is some evidence which would create a genuine issue of fact. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986). Conclusory allegations will not suffice to create such a genuine issue, and there must be more than a "scintilla of evidence."Anderson at 252.

B. Failure to Promote and Disparate Treatment

Courts examine Title VII claims for failure to promote and § 1981 claims for disparate treatment upon the grounds of race, national origin and gender under a three-pronged burden shifting analysis. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973); Sprott v. Franco, No. 94 Civ. 3818 (PKL), 1998 WL 472061 (S.D.N.Y. Aug. 7, 1998) at *3 citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993)(applying the test to Title VII claims); Martin v. Citibank N.A., 762 F.2d 212, 216-17 (2d Cir. 1985)(applying the test to § 1981 claims). Under the first

prong, plaintiff bears the burden to establish a prima facie case of discrimination by showing: I) that she belongs to a protected class; II) that she applied for and was qualified for a job for which the employer was seeking applicants; III) that despite her qualifications, she was rejected; and IV) that, after her rejection, the position either remained open and the employer continued to seek applicants from persons of complainant's qualifications, or that the position was ultimately filled by a person not of the protected class. Id., Fisher v. Vassar College, 114 F.3d 1332, 1335 (2d Cir. 1997)(en banc), *cert. denied*, 118 S.Ct. 851 (1998). "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." Fisher at 1335 citing Tex. Dep't of Community Affairs v. Burdine, 450 U.S.248, 254 (1981).

The second prong shifts the burden to the defendant to rebut the presumption of discrimination by "producing evidence that the adverse employment actions were taken for a legitimate, non-discriminatory reason." Id. *citing* Hicks at 506-07. However, "[tlhe ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff, [and] if the defendant [merely) articulates a non-discriminatory reason, the presumption raised by the prima facie case is rebutted, and the factual inquiry leads to a new level of specificity." Id. at 1335-36 *quoting* Hicks at 507, Burdine at 255.

The third prong then shifts the burden back to the Plaintiff to demonstrate "that the proffered reason was not the true reason for the employment decision and that race [national origin, or gender] was." Id. at 1336 *quoting* Hicks at 507-08. "Of course, the plaintiff retains that ultimate burden of persuading the trier of fact that she has been the victim of intentional discrimination." Id. citing Hicks at 508. Thus, even if defendant's reasons are found to be pretextual, plaintiff must nevertheless prove defendant did not promote her as the result of intentional discrimination upon the grounds asserted -- here, race, national origin and gender. Rosa v. Nat'l Westminster Bank, 842 F.Supp. 679, 690 (E.D.N.Y.) (*quoting* Hicks at 508), *affd*, 4 F.3d 1501 (2d Cir. 1994)(summary order).

The statute of limitations is 300 days for Title VII claims, and

three years for 1981 claims. Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 712 (2d Cir. 1996); Butts v. City of New York Dep't of Hous. Preservation & Dev., 990 F.2d 1397, 1412 (2d Cir. 1993). As plaintiff filed a discrimination claim with the EEOC on September 14, 1995, allegations of incidents occurring before November 18, 1994 shall be considered time-barred from consideration under Title VII. As plaintiff filed the § 1981 claim on April 15, 1996, allegations of incidents occurring before April 15, 1993 shall be considered time-barred with regard to said claim. Bledsell v. Mobil Oil Co., 708 F.Supp. 1408, 1415 (S.D.N.Y. 1985)(only compelling circumstances warrant application of the continuing violation exception to the statute of limitations).

As plaintiff is an African-American female, she shall be deemed to have satisfied the first element of the first prong of the McDonnell Douglas standard for all Title VII and § 1981 claims asserted.

1. Promotion from level 17 to level 18

Although plaintiff appears to contend that IBM's delay in promoting her from a level 17 position to any level 18 (or higher) position constitutes a cause of action, specific promotional opportunities claimed as denied must be identified. McDonnell Douglas at 802; Holt v. KML-Continental, Inc., 95 F.3d 123, 129 (2d Cir.), *cert denied*, 117 S.Ct. 1819 (1997); Hudson v.Int'l Bus. Mach. Corp., 620 F.2d 351, 354 (2d Cir.), *cert denied*, 449 U.S. 1066 (1980). As stated, plaintiff must demonstrate, *inter alia*, that she applied for and was qualified for specific jobs which the employer was seeking applicants. In any event, plaintiff does arguably allege the following "positions" and one lateral transfer which she sought and did not obtain: Laser Via Inspection, Raleigh Level 17 Manufacturing Line Position, Somers Human Resources Position, Plasma Process Engineer Position, Operations Manager Position, and other JOBPOST positions.[2]

Plaintiff claims defendant promoted lesser qualified white males within the company at a faster rate than she, particularly

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[2] Plaintiff acknowledges that she did not possess the requested proficiency levels for the Human Resources Administrator, Operations Manager, and Plasma Process Engineer positions. (Briscoe Br. at 5).

from level 17 to level 18. (Pl. Compl. ¶18) (Aff. of Karen Briscoe ¶7). Specifically, plaintiff identifies co-workers Schoonmaker, Finger, Garrison, and Boldrin as recipients of defendant's alleged favoritism. (Aff. of Karen Briscoe ¶10). Assuming, arguendo, that the alleged delay in being promoted from level 17 to level 18 stated a cause of action, plaintiff has not established a prima facie case of discrimination under the McDonnell Douglas standard. She has failed to show said individuals possessed similar or inferior qualifications [in comparison to hers] at the time of their promotions. Moreover, she has not shown that her promotion from level 17 to 18 was unduly delayed due to discrimination.

IBM has shown that the twelve white males plaintiff contends received preferential treatment with regard to promotions are not similarly situated. See Burdine, 450 U.S. at 258. (Aff. of Douglas C. Davis at 11 16-24). Plaintiff has not raised a genuine issue of fact in that regard.

Moreover, IBM has shown that between December 31, 1992 and December 31, 1996, the average time spent in level 17 within plaintiff's organization was 64.1 months overall, 64 months for Caucasian workers, and 64.6 months for African American workers. (Evans Aff. at 14). During the same time frame, the average time spent in level 17 within plaintiff's organization was 67 months for African American female workers, and 62.5 months for other workers. Id. The average time spent in level 17 within IBM's microelectronics division was 65 months overall, 64.2 months for Caucasian workers, and 67.6 months for African American workers. Id. at ¶3. Also, within said time frame the average time spent in level 17 within IBM's microelectronics division was 69.2 months for African American female workers and 64.5 months for other workers. [3]

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[3] Plaintiff's failure to specifically controvert the facts alleged in IBM's statement of material facts filed pursuant to Local Rule 56.1 results in those facts being deemed admitted. See Glazer v. Formica Corp., 964 F.2d 149, 154 (2d Cir. 1992). The failure by plaintiff to controvert IBM's Local Rule 56.1 statement in itself justifies granting summary judgment on the failure to promote claims.

Said differences in promotion rates from level 17 and level 8 are not statistically significant. Plaintiff spent 51 months in level 17 before her promotion to level 18. (Davis Aff. at ¶15). Thus she was in fact promoted to level 18 faster than average. Accordingly, her "delay in promotion" claim would have no merit in any event even if it had stated a cause of action.[4] As such, it is respectfully recommended that defendant's motion for summary judgment upon said claim be granted.

2. Laser Via Inspection Engineer "Position"

Plaintiff contends defendant did not timely consider her for the position of Laser Via Inspection Engineer on the grounds of race, national origin and gender. (Aff. of Karen Briscoe ¶56). However, said claim is not actionable because even if such a position existed as plaintiff claims, said position does not qualify as a promotional opportunity. (Aff. of Victoria Hayden ¶14). Rather, certain Process Engineers having familiarity with lasers were occasionally asked to perform laser repairs as part of their duties under said title. (Aff. of Victoria Hayden ¶14). Denial of promotion claims are "actionable"[o]nly where the promotion rises to the level of a new or distinct relation between the employer and the employee ..." Butts v. City of New York Dep't of Preservation & Dev. No. 91 Civ. 5325 (SHS), 1998 WL 13851 (S.D.N.Y. Jan. 15, 1998) at *6.

Here, management's occasional request that certain Process Engineers repair lasers did not carry with it an entitlement to elevated status or pay, and therefore did not consist of a promotional opportunity. (Aff. of Victoria Hayden ¶14). Plaintiff has failed to raise any material issue of fact in that regard. Therefore, plaintiff has not established the fourth element, that defendant promoted similar or lesser qualified individuals to said "position." Fisher at 1335 *citing* McDonnell Douglas at 802. As plaintiff has failed to establish a prima facie case of discrimination

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[4] Plaintiff seeks to raise a factual issue through an analysis of promotion rates of only 19 non-randomly selected IBM employees. (Briscoe Aff. 25-26 and Ex.6; Fitzgerald Aff.) The Court finds such a selective analysis meaningless and insufficient to raise an issue of fact.

upon this ground, it is respectfully recommended that defendant's motion for summary judgment upon said claim be granted.

3. Raleigh level 17 Position

Plaintiff fails to establish a prima facie case of discrimination and disparate treatment regarding the award of positions in Raleigh, North Carolina to other individuals in 1995, because plaintiff has not shown defendant filled said position[s] with non-members of the protected class. In 1995, she was a level 17 employee with a four year degree, held an "electrical technology" degree with honors, and had by that time earned and shared a suggestion award of approximately $65,000.00 for a work-related accomplishment with another employee. (Aff. of Karen Briscoe ¶65). Plaintiff has thus adequately established qualification for the position and rejection therefor -- elements two and three of the standard. See McDonnell Douglas at 802; Powell at 1155.

Plaintiff fails to meet the fourth element of the standard, however, because defendant filled one of the Positions with an African-American female. (Aff. of Tibbs ¶5), (Aff. of Cunha ¶7). Fisher at 1335 *citing* McDonnell Douglas at 802 *(stating* the fourth prong of the standard requires "the ultimate filling of the position by a person not of the protected class"). As plaintiff has not satisfied the fourth element of the standard, she has failed to establish a prima facie case of discrimination on the grounds of race, national origin, or gender with regard to said position[s].

Moreover, defendant has successfully rebutted any inference of discrimination by illustrating defendant filled another Raleigh position with a white male employee, Robert McCord, who was a more qualified candidate. Fisher at 1335 *quoting* Hicks at 507. A defendant may establish an adverse employment action was taken for a legitimate, non-discriminatory reason by showing plaintiff was disfavored for being less qualified for the job. *See Id. citing* Hicks at 509. First, McCords's absence rate was lower than plaintiff's, significantly in 1995, during which he did not miss a day of work. (Def. Reply Mem. at 17). Although plaintiff and defendant dispute the actual rates of plaintiff's absences, plaintiff cannot claim a perfect attendance record for any one full employment year. See Burrell v. Bentsen, No.91 Civ. 2654 (KMW)(NRB), 1993 WL 535076 (S.D.N.Y. Dec. 21, 1 993) at *8. ("It is self-evident that while perfect attendance is not a

necessary element for all jobs, reasonably regular and predictable attendance is necessary for many.") Also, McCord's job experience afforded him level 18Q status as opposed to plaintiff's level 17 status at the time. Furthermore, he has a prior rating as the second best performer in his organization who "demonstrate[d] continuous dependability and flexibility, proven by his dedication in being on call, staying late, coming in on third shift hours and phone in assistance ... [and] adjusting his personal life to meet the objective." (Aff. of McCord ¶52), (Aff. of Cunha ¶5).

By contrast, plaintiff rated 18th among 71 level 17 employees in 1992, 32nd out of 47 level 17 employees in 1993, and 21st out of 31 level 17 employees in 1994. (Aff - of Douglas C. Davis ¶14). Plaintiff was also placed in defendant's "Employee Improvement Program" for her problems with absenteeism. (Aff. of Victoria Hayden ¶3). Furthermore, while McCord was under no medical restriction from physical movement at the time, plaintiff was unable to perform such tasks as lifting, pushing, pulling, sitting or standing for prolonged periods, and could not perform inspection work required of all others in her position. (Aff. of Douglas C. Davis ¶11). As said factors indicate McCord was better qualified for the Raleigh position, IBM has successfully rebutted any possible presumption of discrimination upon the grounds of race, national origin and gender. It is therefore respectfully recommended that defendant's motion for summary judgment upon said claim be granted.[5]

4. Human Resources Manager Position

Plaintiff fails to establish a prima facie case of discrimination with regard to the Human Resource Manager position because plaintiff has not shown qualification for the position. Also, IBM filled the position with a person of greater qualification for the job.

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[5] IBM's uncontroverted Local Rule 56.1 Statement also alleges that the two Raleigh managers who made the hiring decision on McCord did not consider the race or gender of any applicant, that McCord possessed superior qualifications, and that plaintiff was medically restricted from meeting position requirements. (IBM Local Rule 56.1 Statement ¶¶ 111 - 121.)

Plaintiff concedes that the position required a four year degree in human resources, communications or business administration. (Briscoe Br. at 6). However, plaintiff had a four year degree in psychology, and therefore did not have the requisite educational background for consideration. (Id.). Also, a department wide freeze on transfers rendered everyone in her division "unqualified" for said position at the time. (Aff. of Victoria Hayden ¶16). As plaintiff has not shown qualification for the position, she has failed to satisfy the first element of the standard. McDonnell Douglas at 802-04.

Plaintiff has also failed to satisfy the fourth element of the standard because defendant filled the position with an individual who had a master's degree in human resources, and two years of prior relevant experience as a human resources program administrator at the company. (Aff. of Cimorelli ¶6). By contrast, plaintiff had no prior experience in the human resources department at the company. As said factors indicate plaintiff was the lesser qualified candidate for the Human Resources Manager position, plaintiff has not satisfied the fourth element of the standard, and has therefore failed to establish a prima facie case of discrimination upon the grounds of race, national origin and gender. Therefore, it is respectfully recommended that defendant's motion for summary judgment upon said claim be granted.

5. Plasma Process Engineer Position

Plaintiff fails to establish a prima facie case of discrimination with regard to the Plasma Process Engineer position because she has not shown she was qualified for the position. The position required a bachelor of science degree in mechanical engineering, physics or chemistry, three years of job experience in manufacture engineering, a background in plasma technology, and certain proficiency levels in four categories. (Aff. of Merryman ¶3); (Briscoe Br. at 5). Plaintiff had a degree in psychology with a minor in chemistry, and merely met two out of the four requisite proficiency levels. (Briscoe Br. at 5). Furthermore, defendant filled the position with an employee having prior experience in the "plasma area." (Aff. of Merryman ¶6). Said employee also held a bachelor of science degree in mechanical engineering, and was a candidate for a master's degree in mechanical engineering at the time of promotion. (Aff. of Merryman ¶6).

As plaintiff has not satisfied the second and fourth elements of the standard, she has failed to establish a prima facie case of discrimination on the grounds of race, national origin, or gender with regard to the Plasma Process Engineer position.

Therefore, it is respectfully recommended that defendant's motion for summary judgment upon said claim be granted.

6. Operations Manager

Plaintiff fails to establish a prima facie case of discrimination with regard to the Operations Manager position because she has not shown she was qualified for the position. First, plaintiff concedes that she met only three out of the eight requisite proficiency levels. (Briscoe Br. at 5). Also, the position was a "senior exempt level position" requiring prior experience in finance, operations, and management; experience plaintiff did not have. (Aff. of Kirby ¶¶ 3,6). Defendant ultimately filled the position with a female having over twenty-five years of senior staff experience in all areas, and who had been selected for the Executive Resource Program -- a program for individuals who show qualification and potential for executive-level management positions. (Aff. of Kirby ¶7). The successful applicant, Patricia McCarthy, had all of the necessary qualifications including experience in the business areas for which the consulting services were to be provided. (Id.)

By contrast, plaintiff had eight years of experience in the manufacturing and production area. Also, she had not been selected for the Executive Resource Program. Moreover, the IBM official making the hiring decision was not aware of the race of the plaintiff, as the JOBPOST system does not reveal that type of information. (Aff. of Kirby ¶6). As plaintiff clearly did not possess the necessary qualifications, and the position was filled with an applicant who did, she has not satisfied the second and fourth elements of the standard. No issue of material fact exists in that regard. Therefore, it is respectfully recommended that defendant's motion for summary judgment upon said claim be granted.

7. Other JOBPOST positions

Plaintiff fails to establish a prima facie case of discrimination with regard to the other miscellaneous JOBPOST positions because she has not delineated the specific promotional opportunities at

issue, has not demonstrated that she was qualified for said positions, and has not shown that the defendant filled those positions with non-members of the protected class who were less qualified than she. Moreover, the race and national origin of each applicant is not listed on a JOBPOST application. (Aff. of Edmonds ¶5). Thus, said factors could not possibly form the basis of any JOBPOST employment decision. As plaintiff has not satisfied the second and fourth elements of the McDonnell Douglas standard, she has failed to establish a prima facie case of discrimination on the basis of race, national origin and gender with regard to said positions. As such, it is respectfully recommended that defendant's motion for summary judgment upon said claim be granted.[6]

With regard to each of the aforementioned claims, plaintiff has failed to establish the existence of a material issue of fact as to whether or, not defendant withheld and delayed promotions upon the grounds of race, national origin, or gender under Title VII and § 1983. "A plaintiff facing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts ... a plaintiff must offer concrete evidence from which a reasonable juror could return a verdict in her favor." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Specifically, plaintiff has failed to show either qualification for each Position, or the subsequent filling of the Position with a similar or lesser qualified candidate. Fisher at 1335, McDonnell Douglas at 802-04.

In each instance, plaintiff has also failed to show the alleged discrimination was intentional. See Rosa at 690 *quoting* Hicks at 508 ("...plaintiff must, nevertheless, prove that she was not promoted as a result of intentional discrimination ...") At best,

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[6] Plaintiff also claims IBM did not consider her for a handling engineer assignment position despite her qualifications. (Aff. of Karen Briscoe ¶33). As any such promotional opportunity was denied in February 1 994, it is time-barred for purposes of this litigation. See Van Zant at 712. In any event, defendant has not demonstrated a prima facie case.

plaintiff has provided very little beyond speculation that defendant acted with discriminatory intent upon the grounds of race, national origin and gender in its employment decisions. Thus, the circumstances herein do not support an inference of discrimination. Therefore, plaintiff would not be entitled to a verdict in her favor upon said claims, and cannot survive summary judgment thereon. Simply stated, no issues of material fact have been demonstrated under the governing standards.

For the foregoing reasons, it is respectfully recommended that defendant's motion for summary judgment upon each of plaintiff's claims for failure to promote upon the grounds of race, national origin and gender be granted.

C. Retaliation

"It is unlawful for an employer to retaliate against an employee for filing a charge pursuant to Title VII." Torres v. Pisano, 116 F.3d 625, 639 (2d Cir.) *cert. denied*, 118 S.Ct. 563 (1997). On a motion for summary judgment, 1) a plaintiff must demonstrate a prima facie case of retaliation, 2) defendant then has the burden of pointing to evidence that there was a legitimate, non-retaliatory reason for the complained of action; and 3) if the defendant meets its burden, plaintiff must demonstrate that there is sufficient potential proof for a reasonable jury to find the proffered legitimate reason merely a pretext for impermissible retaliation." Gallagher v. Delaney, 139 F.3d 338, 349 (2d Cir. 1998) *citing* Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995). In order to establish a prima facie case of unlawful retaliation, a plaintiff must show: "I) participation in a protected activity known to the defendant; II) an employment action disadvantaging the plaintiff; and II) a causal connection between the protected activity and the adverse employment action." Torres at 639.

Filing a discrimination claim with the EEOC is protected activity. Eteng v. New York State Dep't of Labor, No. 92 Civ 252 (LAP), 1994 WL 642789 (S.D.N.Y. Nov. 15, 1994) at *8. Therefore, plaintiff has satisfied the first element of a prima facie case for retaliation with regard to each claim asserted.

It is well settled that "a finding of unlawful retaliation is not dependent on the merits of the discrimination complaint." Davis v. State Univ. of New York, 802 F.2d 638, 642 (2d Cir. 1986). She

need only demonstrate that she had "a good faith, reasonable belief that the underlying challenged actions of the employer violated the law." Mahohharan v. Columbia Univ. College of Physicians & Surgeons 842 F.2d 590, 593 (2d Cir. 1988).

1 . Undermining Authority

Plaintiff claims her manager "conspired with employees to undermine [plaintiff's] supervising authority and ability to train the employees by encouraging them to disregard her actual and/or apparent authority and by not giving the plaintiff the same opportunities to attend seminars and other training, that were provided to other employees." (V.Am. Compl. ¶25). Specifically, plaintiff claims managers excluded her from a "thank you e-mail" commending others for work she also participated in; falsified her role in the department; did not acknowledge her achievements and duties in her appraisal; and refused to refer her for higher level positions she qualified for. (Aff. of Karen Briscoe ¶¶ 55,70),

"An adverse employment action must affect the terms, privileges, duration or conditions of employment." Ginsburg v. Valhalla Anesthesia Assoc., 971 F.Supp. 144, 148 (S.D.N.Y. 1997) citing Yankelevitz v. Cornell Univ., No. 95 Civ. 4593 (PKL), 1996 WL 447749 (S.D.N.Y. Aug. 7, 1996) at *5 (citations omitted), *modified on other grounds*, 1997 WL 115651. "Claims of retaliation are not limited to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." Id. *quoting* Passer v. American Chemical Soc., 935 F.2d 322, 331 (D.C. Cir. 1991). However, "there must be some impact on plaintiff's employment or prospective employment." Id. *citing* Yankelevitz at *5.

Here, plaintiff has not demonstrated that there was a materially adverse change in her employment at IBM on account Of said allegations. She was promoted to level 18 in February 1996, several months after filing her EEOC complaint on September 14, 1995. Also, it has not been demonstrated that plaintiff was denied any Position because of her allegations.

In any event, plaintiff has failed to establish a causal connection between the protected activity and the alleged retaliation. "Proof of causal connection can be established indirectly by showing that the protected activity was followed closely by discriminatory treatment." Dicinto v. Westchester

County Med. Ctr. 821 F.2d 111,115 (2d Cir.), *cert. denied*, 484 U.S. 965 (1987), *citing* Davis v. State University of New York, 802 F.2d 638, 642 (2d Cir. 1986). Causation may also be established through "evidence of retaliatory animus directed against a plaintiff by defendant." id. *citing* Hochstadt v. Worcester Foundation for Experimental Biology, Inc. 425 F.Supp. 318, 328-29 (D-Mass), *affd*, 545 F.2d 222 (1st Cir. 1976). Retaliatory animus is apparent when others do not receive the same treatment for engaging in identical behavior. *See* Id.

Plaintiff testified during her deposition that the alleged conspiracy to undermine her authority began as early as 1990 or 1991, over five years before the EEOC complaint was filed in September, 1995. (Briscoe Dep. at 816). Also, plaintiff did not controvert IBM's Local Rule 56.1 Statement that the alleged conspiracy to undermine her authority began as early as 1990 or 1991. (IBM Local 21 Rule 56.1 Statement at ¶131). As such, the statement is deemed admitted. In any event, the plaintiff has failed to adequately document that any of the alleged retaliation took place shortly after the filing of the September, 1995 EEOC complaint and / or the instant action. *See* Bernheim v. Litt, 79 F.3d 318, 325 (2d Cir. 1996)(a plaintiff may not predicate a retaliation claim on acts that predate the protected activity). Lastly, plaintiff has not otherwise demonstrated a retaliatory animus to support said claim.

As the acts that plaintiff complains about are alleged to be of a long-standing continuous nature, they cannot be deemed retaliatory. Accordingly, it is respectfully recommended that IBM's motion for summary judgment on said claim be granted.

2. Work at Home

Although plaintiff claims IBM retaliated against her by refusing to allow her to complete work assignments at home, she has failed to make out a prima facie case of retaliation upon this ground.[7] (V. Am. Compl. ¶41), (Aff. of Karen Briscoe ¶85).

Plaintiff has satisfied the second element of the standard

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[7] Plaintiff has been on sick leave due to a claimed environmental allergic disorder since March 1997.

because the failure to allow plaintiff to work at home directly affects her privileges of employment. *See* Ginsburg, 971 F.Supp. at 148.

Plaintiff has failed to establish the third element, however, for failure to show that other employees similarly situated were treated differently. "Proof of causal connection can be established ... through evidence such as disparate treatment of fellow employees who engaged in similar conduct ...." DiCinto, 821 F.2d at 115 *citing* Simmons v. Camden County Bd. of Educ., 757 F.2d 1187, 1188-89 (11th Cir. 1985), *cert. denied*, 767 U.S. 938. Although plaintiff claimed she knew of others who were granted permission to complete work assignments at home, she could not identify the specific duties of any of the employees. (Briscoe dep. at 489-493). Plaintiff, in her affidavit, identifies RIE engineer Alice Lucasi as an employee with a position closely resembling hers who was allowed to work at home for a "few months." (Briscoe Aff. at ¶85). However, she has failed to demonstrate that the circumstances were comparable. Plaintiff has therefore failed to establish the requisite similarity in situation to illustrate defendant's failure to allow her to work at home for a period of time was retaliatory. Furthermore, plaintiff conceded that the on-site nature of her job duties made home assignment infeasible [8], and that she in essence sought to be accommodated with different job duties altogether. Furthermore, plaintiff did not request to work at home until May, 1997, long after filing her EEOC complaint in September, 1995, and the instant action in April, 1996. No retaliatory animus is evident. No issue of material fact has been set forth in that regard.

Under such circumstances, defendant's failure to create another position for plaintiff's home cannot be considered as retaliatory. As such, it is respectfully recommended that defendant's motion for summary judgment upon said claim be granted.

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[8] Plaintiff performed on-site line coverage duties such as running tools, acting as safety representative, working with engineers, and training other employees. (Briscoe dep. at 489, 496, 681-83).

3. Denial of Medical Benefits and Worker's Compensation

Plaintiff claims defendant retaliated against her by denying worker's compensation and medical benefits with regard to her severe allergies and multiple chemical sensitivity disorder. (Aff. of Karen Briscoe ¶84). Plaintiff fails to establish a prima facie case upon said claim, however, because the insurance company, not IBM, denied the claim[s] upon the ground that the underlying condition is not covered under plaintiff's insurance plan. (Aff. of Karen Briscoe ¶84). Moreover, the Worker's Compensation Board, not IBM, evaluates each claim for benefits. N.Y. WORK. COMP. LAW § 20 (McKinney 1996). Neither the scope of one's health insurance nor the grant or denial of worker's compensation benefits is a proper ground for a retaliation claim because said claims are handled by entities other than defendant. As such, plaintiff has failed to establish a prima facie case of retaliation upon said grounds. Therefore, it is respectfully recommended that defendant's motion for summary judgment concerning this claim be granted.

4. Retaliatory Treatment by IBM Doctor and Nurse

Plaintiff claims Dr. Peter Olenen and nurse Margie Katz retaliated against her for filing discrimination charges against defendant. (Aff. of Karen Briscoe ¶83). Plaintiff fails to establish a prima facie case with regard to said claim, however, because her allegations of mistreatment do not qualify as adverse employment actions. Plaintiff claims Olenen and Katz refused to provide her with a specialist, refused to allow access to her caretaker, referred her to an abusive pulmonologist, refused to schedule an appointment for a particular week after she received an allergy shot, engaged in rude behavior, did not properly diagnose her, wrongfully asserted a right to review her psychiatric records, and did not administer proper tests. (Aff. of Karen Briscoe ¶¶76-83). Said allegations, however, solely regarded the nature of plaintiff's medical treatment and did not affect her employment or professional reputation. *See* Ginsburg, 971 F.Supp. at 148. As such, plaintiff has not established the second element of the standard.

Plaintiff, moreover, stated that Olenen and Katzs' "retaliation was damaging to me as well as other IBM employees." (Aff. of

Karen Briscoe ¶78). Said allegation rebuts any inference of retaliatory motive specifically towards plaintiff. *See* Eteng at * 6 *citing* 968 F.2d 171, 182 (2d Cir. 1992)("A plaintiff ... needs to establish facts adequate to permit an inference of retaliatory motive to make out his or her prima facie case..."). As such, plaintiff has failed to establish a prima facie case upon said claim. Thus, it is respectfully recommended that defendant's motion for summary judgment upon said claim be granted.

D. Intentional Exposure to Toxic Material

Plaintiff fails to establish a prima facie case of intentional exposure to toxic material, because she has not substantiated her theory that defendant falsified her medical records in order to effectuate a "retaliatory" transfer to an area called "The clean room" after she filed complaints against the company. (Briscoe Aff. ¶71). Plaintiff contends defendant falsified her medical record to "reflect no restrictions," so as to plot a retaliatory transfer to the "clean room" where "dust and debris"' made it "inappropriate for [her] restriction to avoid dust and fumes." (Id.)

Plaintiff's claim of retaliatory falsification of records is inconceivable, however, because plaintiff allowed her records to reflect that no permanent medical restrictions existed in 1994 -- at least one year before she filed her EEOC complaint in September 1995. (Briscoe Aff. Ex. 36 dated 12/8/94). Defendant informed plaintiff in writing of the opportunity to preserve any permanent medical restrictions in her record in October 1994, yet she did not do so. (Olenen Reply Aff. ¶¶2-4). Said writing stated that if plaintiff did not reply by a certain date, defendant would remove the restriction to "avoid dust and fumes while wearing contacts" from her record. (Id.) Plaintiff did not so reply, and therefore defendant removed said restriction. (Id.) As plaintiff allowed the restriction to remain on her medical record as early as 1994, defendant could not have falsified her record in retaliation to her complaint filed in 1995.

Furthermore, plaintiff has not alleged or shown that IBM transferred her to "the clean room" with the requisite intent. "To sufficiently plead an intentional tort that neutralizes the exclusitivity of the Worker's Compensation Law, plaintiff must allege an intentional or deliberate act by the employer directed at causing harm to the particular employee." Acevedo v.

Consolidated Edison Co. of New York., 189 A.D.2d 497, 500-01, 596 N.Y.S.2d 68, 71 (1st Dep't 1993) *citing* Myrolie v. GAF Corp., 81 A.D.2d 994, 440 N.Y.S.2d 67 (3d Dep't 1981) *affd* 55 N.Y.2d 893 (1982). "In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act." Id. *citing* Finch v. Swingly, 42 A.D.2d 1035, 348 N.Y.S.2d 266 (4th Dep't 1973). "A mere knowledge and appreciation of a risk is not the same as the intent to cause injury.' Id. "A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge to a substantial certainty such a result will ensue." Id.

Here, plaintiff alleges "defendant knew or should have known" of her asthmatic condition at the time of her transfer to the clean room. (Mem. in Opp. p.11). In conjunction with her claim of falsification of records, she further alleges that "her new manager [in the clean room] was unaware of her medical restrictions." (Aff. of Karen Briscoe ¶71). However, plaintiff also states that upon transfer, she experienced an actual improvement in health. (Aff. of Karen Briscoe 73). At best, plaintiff has shown that IBM may have been aware of a risk of sending her to the clean room at one time. However, such speculation does not suffice to illustrate the requisite level of intent. Acevedo at 500-01. Simply stated, plaintiff has not pointed to any evidence to show that IBM transferred her to the clean room to intentionally cause her to become injured by the exposure to chemicals.[9] As such, plaintiff has failed to show a retaliatory animus by falsification of medical records and transfer to an allergenic environment to establish a prima facie case of retaliation for "intentional exposure to toxic chemicals." No issue of material fact exists in that regard. Thus, it is respectfully recommended that defendant's motion for summary judgment upon said claim be granted.

III. CONCLUSION

For the foregoing reasons, it is respectfully recommended that defendant's motion for summary judgment be granted with respect

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[9] Moreover, plaintiff was not the only employee to be placed at that part of the facility.

to all claims.

IV. NOTICE

Pursuant to 28 U.S.C. § 636(b)(1) as amended, and Rule 72(b), Fed. R. Civ. P., the parties shall have ten (10) days, plus an additional three (3) days, pursuant to Rule 6(e), Fed. R. Civ. P., or a total of thirteen (13) working days, see Fed. R. Civ. P. 6(a), from the date hereof, to file written objections to this Report and Recommendation. Such objections, if any, shall be filed with the Clerk of the Court, with extra copies delivered to the Chambers of The Honorable Barrington D. Parker, Jr. at the United States Courthouse, 300 Quarropas Street, White Plains, New York 10601-4150, and to the chambers of the undersigned at the said Courthouse.

Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be entered. Requests for extensions of time to file objections must be made to the Honorable Barrington D. Parker, Jr.

Dated: December 14, 1998
White Plains, New York

Respectfully submitted,

GEORGE A. YANTHIS
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK

Copies of this Report and Recommendation have been mailed to:
The Honorable Barrington D. Parker, Jr.
Percy W. Briscoe, Esq.
William F. Haigney, Esq.

ORDER ADOPTING REPORT AND RECOMMENDATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN A. BRISCOE,

Plaintiff,

- against -

96 Civ. 2657
(BDP)(GAY)

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

Parker, J., U.S.D.J.

Plaintiff, Karen A. Briscoe ("Briscoe"), an African-American female, brought claims against her employer, International Business Machines Corporation ("IBM"), pursuant to 42 U.S.C. § 2000(e) et seq. (Title VII) and 42 U.S.C. § 1981. In essence, her claims are that she was discriminatorily treated and paid substandard wages in comparison to comparable male employees and that IBM stunted her professional advancement by engaging in employment discrimination. She also claims that IBM retaliated against her for raising issues of invidious discrimination. Following discovery, IBM moved for summary judgment. See Fed. R. Civ. P. 56.

The motion was referred to the Honorable George A. Yanthis, Magistrate Judge for a Report and Recommendation. In a Report and Recommendation dated December 14, 1998, Judge Yanthis, in a thorough opinion, recommended that IBM's summary judgment motion be granted in all respects. Judge Yanthis cautioned that Rule 72(b), Fed. R. Civ. P., required timely written objections to his Report and Recommendation. Plaintiff filed objections on

January 8, 1999 and IBM responded to them on February 11, 1999. Plaintiff again responded on February 19, 1998.

Rule 72 mandates a de novo review of only those portions of the Magistrate's Report to which a specific written objection has been made. See e.g. Grasso v. Artuz, No. 1998 WL 542312 at *2-3 (S.D.N.Y. August 25, 1998). On the other hand, findings as to which no specific written objections has been made may be adopted. See Thomas v. Texaco, 998 F. Supp. 368, 369 (S.D.N.Y. 1998). Generally conclusory objections which "fail to refer the specific rulings or portions of the Report and largely merely restate the arguments presented to the Magistrate Judge" do not require de novo review. Cooper v. Parsky, No. 95 Civ. 10543 (JGK) 1997 WL 105934 at 2 (S.D.N.Y. March 27, 1997). Plaintiff's objections, arguably, do not meet the threshold that warrants de novo review by this Court. The objections largely restate and recast matters previously submitted to, and resolved by, the Magistrate Judge, and the Magistrate's Recommendations may be adopted by the Court for that reason. Notwithstanding the failure to lodge objections with specificity, the Court nonetheless will treat plaintiffs objections as triggering a la de novo review.

1. Ms. Briscoe contends that IBM did not promote her from level a 17 to level 18 in a timely fashion. She also contends that IBM denied her promotions to at least four specific positions. Magistrate Judge Yanthis correctly concluded however, that plaintiff failed to show that the white males whom she contends received preferential treatment for the promotions she sought were similarly situated. Specifically, he correctly concluded that plaintiff had failed to show that the individuals with whom she compared herself possessed similar or inferior qualifications in comparison to hers at the time of their promotions. Moreover, he correctly concluded that she had not shown that her promotion from level 17 to 18 was unduly delayed by discrimination. In addition, Ms. Briscoe failed to establish that her comparable or superior qualifications for the Raleigh, North Carolina position she sought, but did not obtain as well for the Human Resources Manager position, Plasma Process Engineer position and Operations Manager position she unsuccessfully sought. Although plaintiff claims she was denied other miscellaneous positions as a consequence of discrimination, Judge Yanthis correctly reported

that she failed to delineate the specific promotional opportunities at issue and thus did not demonstrate that she was "qualified" for those positions. See Brown v. Coach Stores Inc., 163 F.3d 706 (2d Cir. 1998).

2. Ms. Briscoe claims that she was subject to unlawful retaliation as a consequence of filing EEOC charges. See Torres v. Pezzano, 116 F.3d 625, 639 (2d Cir. 1996). Her claims of retaliation fall into five general areas. First, she claims that her manager "conspired with employees to undermine her supervisory authority and ability to train employees by encouraging them to disregard her actual/and or apparent authority and by not giving the plaintiff the same opportunity to at tend seminars and other training, that were provided to other employees." Judge Yanthis correctly concluded that the alleged retaliation in this area was not shown to have any causal connection with the 1995 filing of her EEOC complaint. This Court's review of plaintiff's moving and supporting papers does not yield admissible evidence on which a reasonable jury could conclude this issue in her favor. Moreover, as Judge Yanthis correctly concluded, Ms. Briscoe's complaints in this area were of a long-standing, continuous nature and could not be deemed to be in response to the filing of EEOC charges.

3. Next, Ms. Briscoe claims that IBM retaliated against her by refusing to permit her to complete work assignments at home. In order to be actionable, the events said to be retaliatory must have had a material or meaningful impact an the plaintiff's employment conditions or opportunities. Ginsburg v. Valhalla Anesthesia Assoc., 971 F. Supp. 144, 148 (S.D.N.Y. 1997). Judge Yanthis correctly concluded that IBM's refusal to permit her to work at home did not adversely impact her working conditions. In addition, plaintiff failed to adduce admissible facts showing that she was treated differently than comparable employees. She also failed to adduce facts tending to show any causal connection between her alleged mistreatment and her EEOC filing. Her EEOC charge was filed in September 1995. This action was commenced in April 1996. She first requested home work in May 1997. Finally, the persons to whom she compares herself and who were, on occasion, permitted to work at home, did not have on-site responsibilities similar to hers when they received temporary homework assignments.

4. Plaintiff also claims that IBM retaliated against her by denying her workers compensation and medical benefits with regard to the various allergies she experienced and for her "multiple chemicals sensitivity disorders." Judge Yanthis correctly concluded that these claims had no merit. IBM's medical insurance carrier, an independent entity, not party to this case, determined that her claims were not appropriate for approval and reimbursement because her doctors were not approved by her HMO and, in addition, were not providing treatment her insurer believed to be necessary or medically sound. Plaintiff adduced no admissible facts to indicate that IBM improperly influenced this decision.

5. Finally, Ms. Briscoe claims that IBM retaliated by intentionally exposing her and others to toxic chemicals. Judge Yanthis noted that this claim was implausible in light of the facts that a number of other IBM employees worked without complaint in the space Ms. Briscoe claims to have been contaminated and that Ms. Briscoe offers no explanation of why IBM would have intentionally exposed them to harm. Judge Yanthis correctly concluded that the affidavits and other materials submitted in opposition to the summary judgment motion were bereft of triable facts that would tend to support plaintiff's assertion that IBM transferred her to a working space for the specific purpose of causing her physical harm.

The Court has carefully reviewed the objections to the Magistrate's Report and Recommendation. The objections, in their entirety, are overruled. The Report and Recommendation of Magistrate Judge Yanthis are adopted by this Court. The Clerk is directed to enter judgment dismissing the complaint.

SO ORDERED:

Barrington D. Parker, Jr.

Dated: White Plains, New York
February 22, 1999

AMENDED VERIFIED COMPLAINT
TRIAL BY JURY DEMANDED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN A. BRISCOE,

Plaintiff,

- against -

INTERNATIONAL BUSINESS MACHINE CORPORATION,

Civil Action No. 96-Civ-2657 (BDP)

Defendant.

Plaintiff, by her attorney, Percy W. Briscoe, an and for her Complaint, alleges as follows:

PRELIMINARY STATEMENT

1. This is an action for declaratory relief, injunctive relief, back pay, compensatory damages and punitive damages and other relief to redress discrimination in the terms, conditions and privileges of employment arising out of the defendants discrimination against plaintiff on the bases of Race, Color, Sex and National origin.

2. Plaintiff files this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq. and the Civil Rights Act of 1991. In addition, plaintiff seeks relief under 42 U.S.C. Sec. 1981, which provides for equal rights of citizens and all persons within the jurisdiction of the United States and pursuant to Rule 15 Of the Federal Rules of Civil Procedure.

JURISDICTION

3. The jurisdiction of this Court, as to the Federal claims invoked, is pursuant to 28 U.S.C. Sections 1331, 1337, 1343,

2201 and 42 U.S.C. Section 2000e-5(f).

4. Plaintiff timely filed a charge of discrimination with the New York State Division of Human Rights, on or about September 14, 1995.

5. The unlawful employment practices alleged below were committed within the jurisdiction of Southern District of Now York.

6. This complaint of discrimination charges the defendant with violations of Title VII of the Civil Rights Act of 1964, as amended, and Section 1981 of the Civil Rights Act, all of which protects plaintiff's right to proceed in a Federal action.

7. On January 22, 1996, at the request of plaintiff's attorney,the Equal Employment Opportunity Commission (BROC) issued a "Notice of Right to Sue", (Exhibit "B") The complaint in this action is filed within ninety (90) days of the receipt thereof.

PARTIES

8. Plaintiff, Karen A. Briscoe, resides at 11 Derick Drive, Fishkill, New York 12524, is a female of African descent and member of the class of persons intended to be protected under 42 U.S.C. Sections. 1981 and 2000e at seq-

9. Upon information and belief, the defendant, international Business Machines, Inc., (hereinafter referred to as "IBM") is a business operating and existing under the laws of the United States and the State of New York, with its principal place of business located at Old Orchard Road, Armonk, Now York.

10. Upon information and belief, said defendant in a Person within the meaning of 42 U.S.C. Sec. 1981 and falls within the it of 42 U.S.C. Sec. 2000e, because it in engaged in industries affecting commerce and employ more than 100 persons, within the United States.

STATEMENT OF CLAIM FOR RELIEF UNDER FEDERAL LAW

11. The defendant has engaged in unlawful discriminatory practices and policies in violation of U.S.C. Sections 1981 and 2000e et seq. with respect to the terms, conditions and privileges

of employment because of plaintiff's race, color, sex and national origin, in violation of the above stated sections of the Federal law.

12. On or about January 3, 1988, plaintiff became employed by the defendant, IBM, as a factory worker.

13. Plaintiff'S responsibilities included manufacturing electrical cards, boards and other electrical components for the defendant's mainframe and personal computers, among other things.

14. Throughout plaintiff's employment with the defendant, plaintiff performed her duties in an exemplary manner. On September 1, 1994, the plaintiff shared & Suggestion Award" with another employee in the amount of thousands of dollars, of which plaintiff was the leading author thereof. Throughout much of plaintiff's employment with the defendant, plaintiff was the lead worker and trouble shooter on many projects, supervised and trained Many co-workers and TV Anchor person for broadcasting IBM's product status, at East Fishkill, but she was given lower pay levels than other employees with less qualification and responsibility than she.

AS AND FOR A FIRST CAUSE OF ACTION

15. On June 29, 1995, plaintiff was told by her immediate manager that she was not promotable and that she was not going to be promoted, in spite of the fact she had satisfied as such and in some cases more of the requirements for promotion than other white males and females, who had already received promotions. Moreover, the denial of plaintiff's promotions has been and still is continuing.

16. Upon information and belief, there have been other white males and females, who have similar and less education and/or experience than the plaintiff and have made lose contribution on their jobs and otherwise than the plaintiff to defendant's business, but they have been given higher evaluations, promotions, recognitions for their contributions than the plaintiff and many of them were transferred to other positions and locations to advance she had been a white male or female she would have had several promotions and/or transferred years ago to a position equal to or higher than some of the white males and females in plaintiff's

department and elsewhere in defendants company moreover, plaintiff would have been given more recognition for her contributions, awards and suggestions that she deserved. The defendant has discriminated against the plaintiff, because of her race and sex, for years and it is continuing.

17. Plaintiff had Bachelors of Science degree and a two year their careers, in the company. Plaintiff verily believe that if associate technical degree, but she has been denied special assignments, transfer and training, given and provided to other white employees, all in violation of her civil rights.

18. Plaintiff has tried to resolve her complaints by endeavoring to exhaust all of defendant's internal grievance procedures, with respect to promotions, transfers, training and suggestion awards, all to no avail.

19. The defendant's blatant discrimination against the plaintiff was willful, intentional and malicious or at the very least it was gross negligence and/or reckless conduct in the form of harassment and other deprivations and afflictions, all of which caused the plaintiff to suffer humiliations, mental anguish, mental and emotional stress and trauma, loss of sleep, wages and otherwise weaken her immune system and made her more susceptible to respiratory harm, when exposed to chemicals, where she experienced excruciating pain, discomfort and damages to her well being.

20. Upon information and belief, based on recent discovery information, plaintiff has discovered that racial and sexual discriminations are much more pervasive and serious in the defendant's East Fishkill facility than expected, such as many white males and some white females are promoted much more frequently and to much high levels, with much less education and experience than some black males and females, among other things.

21. Based on discovery responses received from defendant's counsels, the plaintiff's education, experience and job responsibilities far exceed many of the white males and females, but she is as much as two to six pay levels below them, therefore, the plaintiff last promotion, after having filed this action, and many years of being bypassed is emphatically inequitable, racial and sexual bias, moreover, it appears from the records that, at

least, one of plaintiff's appraisal level was reduced without notice to, knowledge and/or input of the plaintiff; therefore, it appears the plaintiff has earned and deserves, at least, a salary level off at least, 10, under the current salary level guidelines.

22. Because of these pervasive and serious, racial, sexual and unlawful employment discriminatory practices, a Federal investigation into such practices is appropriate and necessary.

AS AND FOR AN ADDITIONAL
AND SECOND CAUSE OF ACTION

23. The plaintiff repeats and realleges each and every allegation set forth in paragraphs "1" to "22" as if they are fully set forth hereinbelow.

24. That upon information and belief, based on the revelations, the facts and events that have since evolved, after the plaintiff filed her racial and sex discrimination case, against the defendant, the defendant has and continues to retaliate against the plaintiff, because of her asserting her statutory and constitutional rights.

25. That the plaintiff was assigned to supervise and train about eight to ton of plaintiff's co-workers by the defendant, but thereafter plaintiff's manager conspired with the employees to undermine plaintiff's supervising authority and ability to train the employees by encouraging them to disregard her actual and/or apparent authority and not giving the plaintiff the name opportunities to attend seminars and other training, that were provided to other employees. Because of their conduct the plaintiff has been hold in contempt and ridicule and harassed by her pears and others, and accordingly, she has suffered emotional and physical stress and trauma.

AS AND FOR AN ADDITIONAL
AND THIRD CAUSE OF ACTION

26. The plaintiff repeats and realleges each and every allegation set forth in paragraphs "1" to "25" as if they are fully not forth hereinbelow.

27. That, upon information and belief, the defendant, its

employees and agents know or should have known that the plaintiff had an asthmatic condition, for which there were medical restrictions known to the defendant, in its files, that there were many different chemicals in plaintiff's assigned area, where defendant processed its multi-layered substrates and semiconductors but the defendant, in total disregard for plaintiff's asthmatic condition and danger to her health, transferred her therein, knowing or it should have known that these chemicals in plaintiff's asthmatic condition would endanger her health and she would and was otherwise affected by same. Moreover, the plaintiff was more likely be ill because she was in the area and was being exposed to the chemicals a daily basis for a sustaining period of time, for weeks, on two-day and whereas her co-workers were working in the area on rotating shifts. The plaintiff accepted the transfer in the good faith belief, that the defendant was acting in good faith and the plaintiff had no knowledge that dangerous chemicals were in the area and the consequences therefrom.

28. Upon information and belief, plaintiff has been injured thereby, which has caused her pain and suffering and same will continue indefinitely.

29. That the discriminatory conduct of the defendant, and its employees was done wilfully, maliciously and at the very least recklessly and in total disregard of plaintiff's well-being and same constitutes an intentional infliction of emotional and physical harm upon the plaintiff, and did accomplish its purpose and same in continuing.

AS FOR AN ADDITIONAL
AND FOURTH CAUSE OF ACTION

30. That plaintiff repeats and realleges each and every allegation set forth in paragraphs "1" to "29" as if they are fully set forth hereinbelow.

31. That, upon information and belief, plaintiff's illness, from over exposure to the chemicals and from which she became ill and same has continued for about one year and in continuing, all of which arose out of and in the scope of the defendants employment, accordingly her injury should be a worker's compensation case, but it appears the defendant has conspired with its agent to controvert or deny plaintiff's claim, and thus plaintiff's medical

bills, in the amount of about $14,000.00, have not been paid and currently are not being paid by defendant or its agent, insurance carrier, all of which are done so as to retaliate against the plaintiff, for having filed a racial and sex discrimination case against the defendant.

32. That the defendant's and its agent's conduct was done and still are being done wilfully, maliciously and recklessly, all of which constitute & form of retaliation against the plaintiff, and same in continuing.

AS AND FOR AN ADDITIONAL
AND FIFTH CAUSE OF ACTION

33. That plaintiff repeats and realleges each and every allegation not forth in paragraphs "1" to "32" as if they are fully set forth hereinbelow.

34. That, upon information and belief, after plaintiff has repeatedly informed the defendant and its agent, insurance carrier, that her medical bills, in the amount of about $14,000.00 have not been and currently are not being paid, and that the plaintiff has used up her credit line on her credit cards and are having difficulties acquiring medical treatment and care on her low income, and same are not being paid or caused to be paid by the ,defendant.

35. That the conduct of the defendant and its agent was and still is being done wilfully, maliciously and recklessly and constitute a form of retaliation against the plaintiff, and same is continuing.

AS AND FOR AN ADDITIONAL
AND SIXTH CAUSE OF ACTION

36. That the plaintiff repeats and realleges each and every allegation set forth in paragraphs "1" to "35", as if they are fully set forth hereinbelow.

37. That, upon information and belief, the defendant and its agent, medical doctor, have ignored the plaintiff's attending physician's medical opinions and restrictions and have required that the plaintiff attend defendants physician under conditions which have adversely and unwarrantedly aggravated and

precipitated her illness and he has been abusive to the plaintiff and her escort, for, at least, two visits, all of which is designed to retaliate against the plaintiff and same is continuing.

38. That the conduct of the defendant and its agent is willful, malicious and reckless and constitute a form of retaliation and same is continuing.

39. All of the allegations of retaliation herein arose out of defendant's unlawful discriminatory employment practices, because the plaintiff filed charges of racial and sexual discrimination against the defendant.

AS AND FOR ADDITIONAL AND SEVENTH CAUSE OF ACTION

40. That the plaintiff repeats and realleges each and every allegation set forth in paragraphs "1" to "39" as if they are fully set forth hereinbelow.

41. The plaintiff has a Bachelor of Science degree, two (2 year associate technical degrees), a vast amount of experience in the work and operation of the department in which she in assigned and is very skill and proficient in the operation of IBM PC computers. She has on several occasions requested to do work assignments at home, in a medically approved environment, as other employees have done, but she has been denied the privilege to do so, upon information and belief, because of her filing an unlawful employment discrimination case against the defendant. For the reasons stated hereinabove, the plaintiff has suffered, is now suffering, and will continue to suffer additional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other past and future pecuniary and nonpecuniary losses as a direct result of defendant's discrimination.

42. There is no previous action pending in any other court, in any other jurisdiction in the United States, in this matter, except for the original complaint hereinbefore filed.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for a Judgment and/or an Order against the defendant as follows:

1. A declaratory Judgment that the defendant, IBM, engaged in a pattern and practice of employment discrimination on the basis of race, color, sex and national origin, in violation of plaintiff's rights under Federal law;

2. Injunctive relief permanently restraining and enjoining the defendant, IBM, from engaging in patterns and practices of discrimination and directing the defendant to properly evaluate plaintiff's work performance and suggestions and promote plaintiff in accordance therewith, retroactive to September 1, 1994;

3. Judgment for compensatory damages to plaintiff in excess of $50,000,000.00 (FIFTY MILLION DOLLARS) for the deprivations by the defendant of plaintiff's rights to equal terms, conditions and privileges of employment, with regard to race, color, sex and national origin;

4. Judgment for punitive damages in excess of $200,000,000.00 (TWO HUNDRED MILLION DOLLARS) for the defendants willful, intentional, malicious and reckless acts directed at plaintiff because of her race, color, sex and national origin;

5. Judgment for retaliation against the plaintiff on, at least, six (6) occasions, which damaged is in excess of $60,000,000.00;

6. Judgment that the defendant be ordered to engaged in a consent decree to develop and activate a program and goal of providing equal treatment, terms and condition for all of its employees regardless of their race, color, sex and/or sexual orientations.

7. An Order that a Federal investigation be conducted;

8. Court Costs and reasonable attorneys fees and

9. For such other and further relief as the Court may deem just, equitable and proper.

TRIAL BY JURY IS DEMANDED.

Dated: Wappingers Falls
New York
March 16, 1998

PERCY W. BRISCOE, P.C.
Attorney for Plaintiff
152 Old Post Road
Wappingers Falls, New York 12590
(914) 298-0522

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN A. BRISCOE,

Plaintiff,

-against- 96-CIV-2657 (BDP) (GAY)

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

AFFIDAVIT OF KAREN A. BRISCOE

STATE OF NEW YORK
COUNTY OF DUTCHESS

Karen A. Briscoe, being duly sworn, deposes and says.

1. My name is Karen Briscoe and I am the plaintiff in the action of Briscoe vs IBM.

2. I an fully familiar with the facts in this case, as well as the operation, process, procedure and the missions of Department 38JA, in IBM Microelectronics, Division 42, Building 334, IBM East Fishkill, New York, because I was supervising from 8 to 10 employees therein, for my manager, Ms. Victoria Hayden, because she knew very little about the operation and thus, did not know how to manage same and allegedly she was afraid of chemical exposure, because she once worked in the "clean room" and suffered a miscarriage, therefore, she came out on the floor, approximately 4 to 5 times a year.

3. The question is, I am human, the same an the white employees, why did I have to bring forth a complaint to got promotions and/or opportunities. The fact in unfortunately, racism and discrimination are flourishing in the IBM East Fishkill facility. In 1990, I started being harassed by co-workers, after another less qualified white male had been promoted over me. I hoped it

would change when I went to first shift in 1991, but it did not, it became worse when no one would train me on the new tool sets. I had to train myself along with engineering assistance, and the tools were frequently tampered with. I informed Ms. Hayden who ignored the problems. This lead to overwhelming stress and illness and is evident in my attendance record. I tried to make the best of my situation, by attending school, requesting Job posting, placing my name in for transfers and assignments. All of which were denied. I remained at IBM in hopes that eventually they would do what was the right and provide me with an opportunity. While working I was always pleasant and a moral booster. remembering individuals birthdays and assisting all.

4. IBM did not provide me equal opportunity, level, or pay. But required me to continuously do work above my level while lowering and not including my efforts in my appraisals. (Exhibit 1). I was often sought out by management, engineering, and my peers for expertise (Exhibit 2, 14) contrary to Mr. Davis's claim. I was called upon to tour and teach the line process to peers. In 1990/1991 I was selected by Willie Stark, my 4th level manager, to participate in the Leap Handling Team because of prior work experience (Exhibit 3) Steve Jung was not a engineer for this as defendants counsel claims in Deposition.

Karen A. Briscoe RESUME EXCERPTS

EXPERIENCE

1988 - present

International Business Machines, East Fishkill, New York
Product Specialist (1991 to present)

- Supervised 8 to 10 employees in the Laser ablation production of multi-layered substrate manufacturing. Revamped training guidelines to a more productive and timely method resulting in faster training time for all operations. Utilized computer system to monitor computer component flow and made assessments to direct employee operations and tool status. Maintained targets and daily objectives. Scheduled classes and delegated responsibilities to peers which promoted their best skills. Presented achievements and recommendations for area activities, yields, and production.
- Technical. Successfully diagnosed and repaired laser and reactive ion etch tool problems to hardware component level utilizing software and electronic test equipment.
- ISO 9000 Auditor. Developed, documented and administered training packages and procedures. Audited to the ISO 9000 Standard.
- Process Engineering. Investigated and dispositioned product that did not meet customer specifications and analyzed results to eliminate repeatability. Acquired the Laser Via Inspection area.
- Anchor Person. Televised IBM East Fishkill Quarterly Report of the site's news and production status during 1991. Co-writer, director and anchor for IBM East Fishkill site training video, televised from 1989-1992.
- Inventor. Developed rework process the resulted in over 1 million dollars per year in savings. Received Suggestion Achievement Award.

EDUCATION

May 1983 - Howard University, Washington D.C. Bachelor of Science, Psychology. Minor Chemistry (Pre-Med studies)

May 1994 - Dutchess Community College, Poughkeepsie, New York, Associated in Applied Science, Electrical Technology.
Phi Theta Kappa - *(International Honor Society of the Two Year College)*

Jan 1997 - Dutchess Community College, Poughkeepsie, New York, Associates in Applied Science, Electrical Mechanical Computer Integrated Manufacturing.
Phi Theta Kappa - *(International Honor Society of the Two Year College)*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN A. BRISCOE,

Plaintiff,

- against - 96-Civ-2657 (BDP)(GAY)

INTERNATIONAL BUSINESS
MACHINE CORPORATION,

Defendant.

AFFIDAVIT OF REGINALD STAPLES

STATE OF TEXAS)
COUNTY OF DALLAS) SS: 281546919

REGINALD STAPLES, being duly sworn deposes and says:

1. My name is Reginald Staples, a former employee of IBM, in its East Fishkill facility, from 1989 to 1996.

2. I am an African American male and I am fully familiar with IBM treatment of black males and females.

3. When I was hired by IBM I had a Bachelor of Science in Electrical engineering Technology degree, I was told in order to become an engineer, I would have to obtain a]Bachelor of Science in Electrical Engineer Degree, though there were white Engineers with only a Bachelor of Science in Electrical Engineering Technology degrees. I went back to school and obtained a Master of Science in Electrical Engineering degree and a Master of Science Computer Engineering degree, but I was never offered or interviewed for an Engineering position over the 8 years of my employment with IBM, but I observed Caucasians continuing to move into Engineering positions with either & Bachelor of Science in Electrical Engineering Technology degree or a Bachelor of science in Electrical Engineering Technology degree or a Bachelor

of Science in Electrical Engineering degree, moreover, upon information and belief, some of them had no degrees. Furthermore, I had an A.A.S in Mechanical Engineering and an A.A.S. in Drafting and Design, as well as 8 years of computer Radar Technician and 2 years Mechanical Draftsman experience in the Navy, but as aforesaid I was never offered or interviewed for an Engineering position. All of which constituted racial discrimination against me, because I am black.

4. My highest pay level was level 20, many white employees with no college degrees and much less experience than I, were given pay levels much higher than I, again, because they were white.

5. I was obviously discriminated against because of my race, not only, with respect to assignments, larger work loads, pay levels, but also, with respect to promotions, transfers and training that white employees were freely given.

6. While I was employed by IBM, in East Fishkill, I observed that Ms. Karen Briscoe, who, also has seven degrees, was the supervisor of several employees at the IBM East Fishkill facility, that she, not only, was the supervisor of the department, but was working several other jobs, in her department, yet she was not given promotions commensurate with her education, responsibilities and experience, in fact, not given even equal pay levels with white employees, with less education and experience, nor equal training, assignments, transfers and opportunities as white employees.

7. My observation is that, over 8 years that I was employed by IBM, there was a definite pattern of racial and sexual discrimination, with respect to assignments, work loads, pay levels, promotions, training and transfers.

Reginald Staples

Sworn to before me this
27th day of May, 1998
Deborah K. Barefield - Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN A. BRISCOE,

Plaintiff,

96-Civ-2657 (BDP) (GAY)

-against-

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

AFFIDAVIT OF JEANETTE BRISCOE

STATE OF NEW YORK)
COUNTY OF DUTCHESS) SS:

JEANETTE BRISCOE, being duly sworn, deposes and says:

1. My name in Jeanette Briscoe. I am the mother of Karen A. Briscoe. I have been assisting her during the difficult periods of her illness since, about March, 1997.

2. On or about January 21, 1998, Ms. Briscoe had a doctor's appointment with Dr. Peter Olenon, shortly after having had her periodic medical treatment by Dr. Kenneth Bock, her attending physician, for chemical exposure, immediately after which she was required to stay in isolation a few days before returning to a normal environment.

3. When Ms. Briscoe told Dr. Olonen about her restrictions he disregarded them and directed her to make her appointment in his office, in spite of her attending physician's directions. Ms. Briscoe make her appointment and became sicker in his office because of being out of isolation, the long wait in his office, which was not equipped for patients with multiple chemical sensitivities.

4. When Ms. Briscoe became sick and I attempted to help her, by giving her support, the doctor was very abusive and said I had to stay outside of his examination room.

5. The only explanation that I could determine for his conduct was that he was very angry about Ms. Briscoe filing racial and sexual discrimination charges against his employer, IBM.

JEANETTE BRISCOE 5/29/98

Sworn to before me this
28th day of May, 1998

John Okon
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN A. BRISCOE,

Plaintiff

96-Civ-2657 (BDP) (GAY)

-against-

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

AFFIDAVIT OF JOHN J. OKON

STATE OF NEW YORK)
COUNTY OF DUTCHESS) SS:

JOHN OXON, being duly sworn, deposes and says:

1. My name in John J. Okon, a former employee of IBM, at the East Fishkill facility, for about 6 years.

2. I am an Africa American male and I am fully familiar with IBM's treatment of black males and females.

3. When I was hired by IBM I had a Bachelor of Arts degree in Communication and college credits toward a Master of Arts degree, in Communication. I, now, have credits toward my Ph.D in Communication and teach at the State University of New York, at New Paltz.

4. My highest pay level at IBM was level 15. There were white employees with no college degrees and less experience than I, who were given pay level higher than I, by virtue of their race.

5. I was discriminated against, because of my race, with

respect to assignments, larger work loads, promotions, transfers and training, whereas many white employees were given more opportunities for advancement.

6. I was laid off in 1993. I was told that the company was keeping as many employees, as possible, with degrees and laying off others. I have since discovered that some of the white employees, without degrees, were not laid off.

7. Therefore, I believe I was one of the minorities, who were laid off, because of my race. I have discovered that the 1993 laid off was disproportionately black employees, many of whom had degrees, whereas some of the white employees without degrees were not laid off, due to the downsizing.

8. Furthermore, many black employees were ranked down, so that they would not be promoted and be laid off during slow periods. For example, my appraisal rating was reduced from a 1 to a 2 for that purpose.

JOHN J. OKON

Sworn to before me this
30th day of May, 1998

Percy W. Briscoe
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN A. BRISCOE,

Plaintiff

96-Civ-2657 (BDP) (GAY)

-against-

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

AFFIDAVIT OF PHILIP L. KNIGHT

STATE OF NEW YORK)
COUNTY OF DUTCHESS) SS:

PHILIP L. KNIGHT, being duly sworn, deposes and says:

1. My name is Philip L. Knight and I worked for IBM East Fishkill, New York from 1974 to 1993.

2. I am an African American male.

3. I am fully familiar with the way IBM treats minority employees.

4. I have a college degree and I was a quality manufacturing engineer for IBM.

5. There were other non-minorities, who were less educated than I, but were promoted to higher pay levels than I and other minorities.

6. I, also, was discriminated against in training, transfers,

assignments, etc.

7. I believe IBM downsizing was racially and sexually based and minority employees were disproportionately laid off and same should be reviewed by top management and the Federal Government.

PHILIP L. KNIGHT

Sworn to before me this
22nd day of June, 1998

John Okun
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN A. BRISCOE,

Plaintiff

96-Civ-2657 (BDP) (GAY)

-against-

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

AFFIDAVIT OF CURTIS McKOY

STATE OF NEW YORK)
COUNTY OF DUTCHESS) SS:

CURTIS McKOY, being duly sworn, deposes and says:

1. My name is Curtis McKoy, an Africa American male, I am presently employed in IBM, East Fishkill facility.

2.I have been employed by IBM for about 14 years.

3. In about 1994 and 1995, I worked in the Laser Department.

4. I observed Karen Briscoe working an supervisor of Ms. Victoria Hayden's department on a daily basis.

5. I also, observed Karen Briscoe training others how to repair the tools, on a regular basis.

6. When I had a problem, I did not hesitate to contact Karen Briscoe.

7. I saw others going to Karen Briscoe for help on various problems.

8. I did not see Ms. Victoria Hayden in the "clean room" or in the work area, on a daily basis.

CURTIS McKOY

Sworn top before me this
31st day of May, 1998

Percy W. Briscoe
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN A. BRISCOE,

Plaintiff

96-Civ-2657 (BDP) (GAY)

-against-

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

AFFIDAVIT OF ANNA MONROE

STATE OF NEW YORK)
COUNTY OF DUTCHESS) SS:

ANNA MONROE, being duly sworn, deposes and says:

1. My name in Anna Monroe, I am American female, presently working at IBM East Fishkill facility, New York.

2. In 1994 to 1995 I was working in Ms. Victoria Hayden's department.

3. I personally witness Karen Briscoe conducting departmental meetings, providing ISO information and training, in Ms. Haydan's department.

4. I did not see Ms. Hayden, my immediate manager, in my work area on a daily basis. I remember seeing Ms. Hayden in the work area about once or twice a year.

5. I, also, did not got credit for my work in ISO, engineering and NSO repairs. Ms. Hayden, also ignored the harassment, by

my peers in my work area.

ANNA MONROE, 5/31/98

Sworn to before me this
31st day of May, 1998

Percy Briscoe
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN A. BRISCOE,
Plaintiff

96-Civ-2657 (BDP) (GAY)

-against-

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

AFFIDAVIT OF LELIA B. JACK

STATE OF NEW YORK)
COUNTY OF DUTCHESS) SS:

LELIA B. JACK, being duly sworn, deposes and says:

1. My name is Lelia B. Jack, I know a Ms. Tangy Ward, who works for IBM Poughkeepsie Plant, for about 8 years.

2. Ms. Tangy Ward is my grand daughter's mother.

3. She was an Assistant Programmer for IBM, for a number of years.

4. She was assigned to do work at home on computer, because she had a small baby, which was my grand daughter.

5. She would get assignments by telephone from her department and she would do them on the computer.

LELIA B. JACK

Sworn to before me this
5th day of June, 1998
Percy Briscoe - Notary Public